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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

AUGUST BECHTOLD,

vs.

THE UNITED STATES OF AMERICA,

~~Appellant,~~

*Plaintiff in Error,*

~~Appellee.~~

*Defendant in Error.*

Transcript of Record.

*Writ of Error to*  
Upon ~~Appeal from~~ the United States District Court for the  
District of Montana.

FILED

SEP 14 1921

F. D. MONCKTON,  
CLERK.







**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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AUGUST BECHTOLD,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

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**Transcript of Record.**

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**Upon Appeal from the United States District Court for the  
District of Montana.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

FRANK A. LENZ, Esq., of Butte, Montana,

Attorney for Petitioner and Appellant.

JOHN L. SLATTERY, Esq., United States District

Attorney for the District of Montana, of Helena,  
Montana,

Attorney for Respondents and Appellees.

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In the District Court of the United States, in and  
for the District of Montana.

No. 329.

In the Matter of the Application of AUGUST  
BECHTOLD for a Writ of Habeas Corpus.

BE IT REMEMBERED, that on October 28th,  
1920, an indictment was filed in the above-entitled  
court against the above-named petitioner, which said  
indictment is in the words and figures as follows, to  
wit: [1\*]

**Indictment.**

United States of America,

District of Montana,—ss.

In the District Court of the United States, within  
and for the District of Montana, of the September  
term of said District Court held at Butte,  
Silver Bow County, in said District of Montana,  
in the year of our Lord one thousand nine hundred  
and twenty.

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\*Page-number appearing at foot of page of original certified Transcript  
of Record.



The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the District of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United States, within the state and district of Montana, upon their oaths and affirmations do find, charge and present:

That one August Bechtold, whose true name is to the grand jurors aforesaid unknown, late of the state and district of Montana, heretofore, to wit, on the 12th day of July, 1920, in the county of Silverbow, in the state and district of Montana, unlawfully and feloniously did make and ferment a certain mash fit for the production of spirits, in quantity about one hundred and twenty gallons, a more particular description of which is to the grand jurors aforesaid unknown, in a certain building other than a distillery, duly authorized according to law, and on premises other than a distillery duly authorized according to law, which premises were then and there situated upon Sections Ten (10) and Three (3), in Township Three (3) North of Range Eight (8) West of the Montana Principal Meridian, upon which premises said building was then and there situated; neither said building nor said premises being then and there a distillery duly authorized according to law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

## SECOND COUNT.

And the grand jurors aforesaid, upon their oaths

and affirmations aforesaid, do further find, charge and present:

That on the 12th day of July, 1920, in the state and district of Montana, the said August Bechtold, whose true name is to the grand jurors aforesaid unknown, late of the state and district of Montana, on premises situated on Sections Ten (10) and Three (3), in Township Three (3), North of Range Eight (8) West of the Montana Principal Meridian, in the county of Silver Bow, in the state and district of Montana, and in the Internal Revenue Collection District of Montana, [2] having then and there in his possession and under his control a certain still set up, did fail and neglect to register the same with the Collector of Internal Revenue of the said United States for the said Collection District, by subscribing and filing with him duplicate statements in writing setting forth particular place where the said still was so put up, the kind and cubic contents of said still, the owner or owners thereof, his or their place of residence, and the purpose for which the said still had been or was intended to be used, and so the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do say that the said August Bechtold, whose true name is to the grand jurors aforesaid unknown, on the day and year aforesaid, on the premises aforesaid, in the state and district aforesaid, unlawfully did have in his possession and custody and under his control a still set up, which was not then and there registered, as required by law; contrary to the form of the statute in such case

made and provided, and against the peace and dignity of the United States of America.

### THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said August Bechtold, whose true name is to the grand jurors aforesaid unknown, late of the state and district of Montana, on the 12th day of July, 1920, in the county of Silver Bow, in the state and district of Montana, on premises situated on Sections Ten (10) and Three (3), in Township Three (3) North of Range Eight (8) West of the Montana Principal Meridian, in the said state and district of Montana, did unlawfully and feloniously carry on the business of a distiller by producing distilled spirits and making a mash fit for distillation and for the production of spirits, without having given bond, as required by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

W. W. PATTERSON,

United States Attorney for the District of Montana.

[3]

[Endorsed as follows, to wit]: No. 735. United States District Court, District of Montana. United States of America, vs. August Bechtold. Indictment: A true Bill, W. D. Fenner, Foreman of Grand Jury. W. W. Patterson, United States Attorney, District of Montana.



Witnesses:

H. M. DENGLER.

JOE MANWARING.

VICTOR SCHWARTZ.

H. B. ENYART.

F. A. MANGOLD.

Bond \$500.00.

Presented by the grand jury in open court, by their foreman, in their presence, and filed this 28th day of Oct., A. D. 1920.

C. R. GARLOW,

Clerk.

By L. R. Polglase,

Deputy.

---

That thereafter, on November 16th, 1920, judgment was duly rendered and entered herein, in the words and figures as follows, to wit: [4]

In the District Court of the United States, in and for the District of Montana.

No. 735.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUST BECHTOLD,

Defendant.

**Judgment.**

The United States Attorney with the defendant and his counsel present in court. The defendant

was thereupon duly informed by the court of the nature of the charge against him as appears in the indictment herein, and of his indictment, arraignment, and plea of not guilty, and of his trial and the verdict of guilty as charged.

And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendant having been duly convicted in this court of the offense of unlawfully making and fermenting a mash fit for the production of spirits on premises other than a distillery duly authorized according to law, unlawfully having in his possession and under his control a certain still set up which was not registered as required by law, and unlawfully carrying on the business of a distiller without having given bond as required by law, committed on the 12th day of July, 1920, in the county of Silver Bow, State and District of Montana, as charged in the indictment herein;

It is therefore considered, ordered and adjudged that for said offense you, the said August Bechtold, be confined and imprisoned in the county jail at Butte, Montana, for the term of nine months, and that you pay a fine of Five Hundred Dollars, and costs taxed at \$33.50, and that you be confined in said county jail until said fine is paid [5] or you are otherwise discharged according to law.

Judgment rendered and entered Nov. 16, 1920.

[Seal]

C. R. GARLOW,

Clerk.

By L. R. Polglase,

Deputy.

---

That thereafter, on November 16th, 1920, a commitment was duly issued herein, in the words and figures as follows, to wit: [6]

In the District Court of the United States, in and  
for the District of Montana.

No. 735.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUST BECHTOLD,

Defendant.

United States of America,

District of Montana,—ss.

**Commitment.**

The President of the United States of America, to  
the Marshal of the United States for the District  
of Montana, GREETING:

WHEREAS, at a term of the District Court of the  
United States for the District of Montana, held at  
the courtroom of said Court in the city of Butte,  
county of Silver Bow, in said District, to wit, on the  
16th day of November, A. D. 1920, the above-named  
defendant August Bechtold was convicted of the of-



fense of unlawfully making a mash fit for the production of spirits and having a still in his possession and carrying on the business of a distiller, committed on the 12th day of July, A. D. 1920, in Silver Bow County, in the State and District of Montana, and within the jurisdiction of this Court, contrary to the form of the statutes of the United States in such cases made and provided, and against the peace and dignity of the United States of America.

And whereas, on the 16th day of November, A. D. 1920, the said defendant was, for said crime of which he stood convicted as aforesaid, by the judgment of said court ordered to be imprisoned for the term of nine months, and to pay a fine of \$500.00 and the costs amounting to \$33.50.

And whereas, it was further ordered by the Court that said sentence of imprisonment be executed upon the said defendant until the other or further order of the Court, by imprisonment in the county jail of the county of Silver Bow, State of Montana, to commence Nov. 22, 1920.

NOW, THIS IS TO COMMAND YOU, the said Marshal, to take and keep and safely deliver the said defendant into the custody of the Sheriff in charge of said county jail, Nov. 22, 1920.

AND THIS IS TO COMMAND YOU, the said Sheriff in charge of said county jail, to receive from the United States Marshal of said District of Montana the said defendant August Bechtold on Nov. 22, 1920, convicted and sentenced as aforesaid, and him, the said defendant, keep and imprison in said county jail for the term of nine months, and until

said fine of \$500.00 is paid or he is otherwise discharged according to law.

HEREIN FAIL NOT.

Witness, The Hon. GEO. M. BOURQUIN, Judge of the District Court of the United States for the District of Montana, and the seal thereof, this 16th day of November, A. D. 1920.

[Seal]

C. R. GARLOW,  
Clerk of said District Court.

By \_\_\_\_\_,  
Deputy Clerk.

The within warrant of commitment was received by me on the 17th day of November, 1920, and is returned executed this 1st day of April, 1921.

JOSEPH L. ASBRIDGE,  
U. S. Marshal.  
By E. L. Sanborn,  
Deputy.

[Endorsed]: Original. No. 735. In the District Court of the United States, District of Montana. The United States vs. Aug. Bechtold. Commitment to County Jail. Stay to Nov. 22, 1920. Further stay until Dec. 4, 1920. Further stay until Apr. 1, 1921. Filed April 6, 1921. C. R. Garlow, Clerk. By L. R. Polglase, Deputy Clerk.

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That thereafter, on June 6th, 1921, application for a writ of habeas corpus was filed herein, in the words and figures as follows, to wit: [7]

In the District Court of the United States for the  
District of Montana.

In the Matter of Application of AUGUST BECH-  
TOLD for a Writ of Habeas Corpus.

**Complaint.**

To the Above-entitled Court and the Honorable  
GEORGE M. BOURQUIN, Judge Thereof:

August Bechtold of Silver Bow County, State and  
District of Montana, respectfully shows:

1. That on the 28 day of October, 1920, at the  
City of Butte, in said District of Montana, an  
indictment, now on file in the office of the Clerk  
of this Court, at Butte, Montana, numbered 735  
entitled "United States of America, plaintiff, vs.  
August Bechtold, defendant.

2. That thereafter, to wit: on the 4 day of  
November, 1920, he was arraigned in the above en-  
titled Court on the charges contained in said in-  
dictment and entered his plea of NOT GUILTY  
to each and all of the charges contained in said  
indictment as more properly appears from the  
entry made in the minutes of this court in said  
Criminal cause No. 735 which, together with the  
indictment above set forth are made a part of this  
complaint.

3. That on November 15, 1920, at Butte, Montana,  
said Criminal cause No. 735, came regularly on  
for trial, the said defendant appearing with his at-  
torney, Frank A. Lenz, whose name has been regu-  
larly entered in said case as defendant's attorney

on or about the 10th day of November, 1920, and that the jury sitting in said case, after hearing the testimony of the plaintiff and of the defendant and the instructions of the Honorable Judge herein and after having retired to consider of their verdict on the charges contained in said indictment returned into open court with their verdict which was by the Court received and ordered read and filed, which was in substance: Guilty as charged in the said indictment, leaving the punishment of the [8] defendant to the Honorable Trial Judge all of which more fully appears in the files and minute entries of said date in said Criminal Cause No. 735 which are herewith made part hereof.

That thereafter, to wit: on the 16th day of November, 1920, at Butte, Montana, in open Court, the defendant, waiving time for sentence and judgment, was by the Honorable Judge of this Court sentenced to pay a fine of five hundred Dollars and be imprisoned for the term of nine months in the County Jail of Silver Bow County, Montana, but that commitment was held in abeyance by order of the Court until the 1 day of January, 1921, and thereafter in further abeyance until the 1 day of April, 1921.

4. That on the 1 day of April, 1921, at Butte, Montana, Joseph L. Asbridge, then and now the duly appointed, qualified and acting United States Marshal for the District of Montana, pursuant to the direction of said commitment delivered defendant into the custody of Larry Duggan, then and



there the duly elected, qualified and acting Sheriff of Silver Bow County, Montana, in charge of the county jail of said county, and that said defendant was by said Sheriff received and imprisoned in compliance with the orders of this Court contained in said commitment.

5. That Larry Duggan of the city of Butte, Montana, is now the duly elected, qualified and acting Sheriff of Silver Bow County, Montana, and as such Sheriff in charge of the county jail of Silver Bow County, Montana and that defendant is now, and ever since the first day of April, 1920 has been a prisoner in said county jail under said sentence and commitment from this Court.

6. That defendant is informed by Frank A. Lenz, his attorney, and verily believes and therefore states the fact to be, his imprisonment under said judgment, sentence and commitment is improper and illegal for the reason that the Sections of the Revised Statutes of the United States upon which said indictment is based were repealed and rendered of no further force or effect by the Eighteenth Amendment to the Constitution of the United States of America and the Act of October 28, 1919, Ch. 28, 41 Stat. I, 305, known as the "National Prohibition Act" prior to the time of the commission of the acts charged in said indictment. [9]

WHEREFORE, petitioner prays that he be awarded a writ of Habeas Corpus, directed to Joseph L. Asbridge, as United States Marshal for the District of Montana, and Larry Duggan, as Sheriff of Silver Bow County, Montana, requiring

that they, and each of them, shall, at a time and place to be designated in said writ, make and file their return thereto and shall at the same time bring the body of said August Bechtold before the Judge who granted the said writ for the purpose of an inquiry into the cause of restraint of his liberty.

That upon the return and hearing of said writ he be ordered to be forthwith released and discharged from custody and that he have such other and further relief as may be fit and proper in the premises.

AUGUST BECHTOLD,  
Complainant.  
FRANK A. LENZ,  
Attorney for Complainant.

State of Montana,  
County of Silver Bow,—ss.

August Bechtold, being first duly sworn, on his oath disposes and says: That he is the complainant above subscribed; that he has read the foregoing complaint and knows the contents thereof and that the matters and things therein stated are true to his best knowledge, information and belief.

AUGUST BECHTOLD,

Subscribed and sworn to before me this 6 day of June, 1921.

[Seal] FRANK A. LENZ,  
Notary Public for the State of Montana, Residing  
at Butte.

My commission expires March 1, 1922.

[Endorsed]: Title of Court and Cause. Complaint. Filed June 6th, 1921. C. R. Garlow, Clerk.

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That thereafter, on June 25, 1921, Court's decision denying application for a writ of habeas corpus was filed herein in the words and figures as follows, to wit: [10]

In the District Court of the United States in and  
for the District of Montana.

In re LAWRENCE, et al.

Five Applications for Habeas Corpus.

**Court's Decision of June 25, 1921.**

The indictments upon which these applicants for habeas corpus were convicted and are imprisoned charge that they violated Section 3258, R. S., in that they had in their possession stills set up and failed to register the same, Section 3281, R. S., in that they carried on the business of distillers without having given bonds, and Section 3282, R. S. in that they made mashes fit for the production of spirits on premises other than distilleries duly authorized, all of date since the Volstead Act.

The applications are based upon the contention that said sections of the revenue laws are repealed by said Act, and in consequence the sentences are void and imprisonment, illegal; and in support thereof the decision by the Supreme Court in the Yuginovich Case, June 1st, 1921, is cited. This decision has been anxiously awaited by courts hopelessly divided in respect to the extent that the

Eighteenth Amendment and Act repeal the old revenue laws, and yet it little clarifies the problem. It determines that certain sections of the old revenue laws, including two here involved, are partially repealed or superseded, but it is in view of circumstances that may or may not be present here and in any other case, dependent apparently upon the particular court's construction of the indictment before it and whether that construction is based on conjectures or surmise or on the language in the indictment used. The indictment in the Yuginovich case is like those here involved, in all material and essential averments. There, as here, the charge relates to and is limited to acts that are yet lawful, viz., distillation of intoxicating liquors, imputing criminality thereto only because done in unlawful circumstances, viz., without compliance with the old revenue laws.

The gist of the offenses charged are not the accused's acts of commission, but are their acts of omission. And why it is conjectured that the Yuginovich indictment intends to charge only acts of commission that are unlawful in any circumstances, viz., distillation of intoxicating liquor for beverage purposes, is—also conjectured. [11]

Neither that indictment nor any of these at bar, contains a word or fair inference that the object of the offenses otherwise fully charged is to devote the liquor to beverage purposes. If any of them did, either it or much other matter therein would be superfluous matter to be ignored, and any such inference would violate the principles of criminal



pleading. It hardly needs to be pointed out that in respect to charges of making liquor for beverage purposes, all these indictments are fatally defective by reason of failure to expressly aver the essential element that the liquor was made for "beverage purposes." Otherwise, the Yuginovich indictment would have been sustained as a sufficient charge of violation of the Volstead Act, even though brought in view of the old revenue laws.

See *Williams vs. U. S.*, 168 U. S. 389.

For all that appears, Yuginovich and these applicants may have been proceeding in strict compliance with the Volstead Act.

If indictments are subject to the method of construction that the Supreme Court finds the trial court adopted in the Yuginovich case, amongst other things it tends to the novel principle that an accused fully charged of one offense, may escape on plea of his own wrong, viz., that he did what was charged but with intent to commit and did commit another offense. For if it is a defense when averred or inferred in the indictment, it ought equally to be a defense to be proven by accused when not in the indictment. The rule is otherwise. Acts as here capable of being done lawfully may be done unlawfully for various reasons and objects and in violation of several statutes. And it is no defense that the act charged to be unlawful for one reason and object and against one statute, is also unlawful for other reasons and objects and against other statutes.

See *Gavierres vs. U. S.*, 220 U. S. 342.

It is true revenue and other regulations are not to sanction unlawful acts and business. They are applied to lawful acts and business, but always such acts and business are capable of also being done unlawfully or to unlawful ends. When so done, what principle avoids the tax, regulations and penalties? Clearly the owner of an auto cannot thus escape upon the plea his car was intended for and devoted to only unlawful transportation of intoxicants. Yet he could not register and secure license for this unlawful object and use. So of a pawnbroker who would attempt to plead he loaned only upon stolen goods. [12]

The Yuginovich case is not controlling here. The Supreme Court emphasizes that it is bound to construe the indictment as did the trial court, and so is restricted to narrow limits. It confines its decision to a charge relating to manufacture of intoxicants for beverage purposes, and in respect thereto finds that the intent of the Volstead Act is to partially repeal or supersede some of the old revenue laws. In a like case it will control. These at bar are not like cases. These indictments are not construed in violation of language and principle to charge offenses consisting of acts of commission unlawful in any circumstances, viz., distillation of intoxicating liquors for beverage purposes, but are construed in obedience to both, to charge offenses consisting of acts of commission in themselves lawful but done under unlawful circumstances of omission, viz., distillation of intoxicating liquors without compliance with the old revenue laws.

This Court held in Sohm's Case, 265 Federal 910, that in cases like these at bar the Volstead Act did not repeal the old revenue laws so far as herein involved. The reasons for that view and which the court adheres, appear in Sohm's Case and in others of like tenor, and need not be repeated. It is believed the Supreme Court's decision in Yuginovich's Case does not militate against the rule of Sohm's Case, even if it does not tend to support it. It follows that applicants' sentences and imprisonment are legal, and habeas corpus is denied. At hearing applicants were *enlarged* upon their own recognizance, and may so continue for thirty days to give opportunity to seek review on appeal, and until any appeal taken is determined.

June 25, 1921.

BOURQUIN,  
Judge.

[Endorsed]: No. 327. In re Charles Lawrence for Writ of Habeas Corpus and 4 Like Cases. Decision Denying Writs. Filed June 25, 1921. C. R. Garlow, Clerk.

That thereafter on July 22, 1921, petition for a writ of error was filed herein in the words and figures as follows, to wit: [13]

In the District Court of the United States in and for the District of Montana.

No. 329.

In the Matter of Application of AUGUST BECHTOLD for a Writ of Habeas Corpus.

**Petition for a Writ of Error.**

Comes now the defendant August Bechtold and petitions this Court for a writ of error herein, and respectfully represents:

That on or about the 16th day of November, 1920, the above-entitled court entered a judgment against the defendant, wherein the defendant was sentenced to be confined and imprisoned in the County Jail at Butte, Montana, for the term of nine months, and to pay a fine of \$500.00 and costs taxed at \$33.50, for the alleged offense of violating Sections 3282, 3258 and 3281 of the United States Revenue Laws (Rev. St. Anno. IV, pp. 44, 24, and 41) on the 12th day of July, 1920. That said judgment and sentence was suspended until the first day of January, 1921, and again suspended until the first day of April, 1921.

That on the said first day of April, 1921, under a commitment out of this court he was thereupon imprisoned in the County Jail at Butte, Montana, to serve his said sentence of nine months' imprisonment, but that on or about the 6th day of June,



1921, he filed an application for a writ of habeas corpus, which said application was on the 15th day of June, 1921, submitted to the Court without argument and by the Court taken under advisement; that, pending the decision of this Court on said application for a writ of habeas corpus, he was, by order of the Court, allowed to go at large upon his personal recognition, and that on or about the 25th day of June, 1921, this Court rendered and entered its decision upon his and four other applications for a writ of habeas corpus, denying his and all said applications, which said decision is entitled: "In Re Lawrence et al.—Five Applications for Habeas Corpus" and includes a permission for an appeal in these cases for a review by the Circuit Court of Appeals for the Ninth Circuit.

That defendant desires said Circuit Court of Appeals for the [14] Ninth Circuit to review his said cause and application for a writ of habeas corpus on the grounds therein named;

Wherefore, this defendant prays that a writ of error issue in this behalf out of the United States Circuit Court of Appeals, for the Ninth Circuit, for the correction of the errors complained of in said application for a writ of habeas corpus, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California.

FRANK A. LENZ,  
Attorney for Defendant.

[Endorsed]: Title of Court and Cause. Petition for a Writ of Error. Filed July 22, 1921. C. R. Garlow, Clerk.

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That thereafter, on July 22d, 1921, order allowing writ of error was filed herein in the words and figures as follows, to wit: [15]

In the District Court of the United States in and for the District of Montana.

No. 329.

In the Matter of the Application of AUGUST BECHTOLD for a Writ of Habeas Corpus.

**Order Allowing Writ of Error.**

On this 22d day of July, 1921, comes the defendant, August Bechtold, by his attorney, and files herein and presents to the Court his petition, praying for the allowance of a writ of error intended to be urged by him, and praying, also, that a transcript of the record, proceedings and papers, upon which the judgment herein was rendered and order made, duly authenticated, may be presented to the United States Circuit Court of Appeals, Ninth Circuit, and that such other and further proceedings may be had as are proper in the premises.

In consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law in the sum of \$750.00 as an undertaking on appeal.

BOURQUIN,  
District Judge.

[Endorsed]: Title of Court and Cause. Order  
Allowing Writ of Error. Filed July 22, 1921. C.  
R. Garlow, Clerk.

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That thereafter, on August 2d, 1921, undertaking  
on appeal was filed herein in the words and figures  
as follows, to wit: [16]

In the District Court of the United States in and  
for the District of Montana.

No. 329.

In the Matter of the Application of AUGUST  
BECHTOLD for a Writ of Habeas Corpus.

**Undertaking on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, August Bechtold, as principal, and  
John R. Moyle and J. W. Mueller as his sureties,  
are held and firmly bound unto the United States  
of America in the full and just sum of \$750.00 to  
be paid to the United States of America, to which  
payment well and truly to be made we bind our-  
selves, our heirs, executors and administrators, suc-  
cessors and assigns, jointly and severally by these  
presents.

Sealed with our seals and dated this 23d day of  
July, 1921.

WHEREAS, on the 16th day of November, 1920,  
at a District Court of the United States, in and for  
the District of Montana, in a suit depending in said  
court between the United States of America as  
plaintiff and August Bechtold as defendant, a judg-

ment was entered against the defendant sentencing him to be confined and imprisoned in the County Jail at Butte, Montana, for the term of nine months, and that he pay a fine of \$500.00 and costs taxed at \$33.50; and

WHEREAS, the defendant, August Bechtold, is desirous of prosecuting an appeal from the judgment and sentence and an order of said Court, denying defendant's application for a writ of habeas corpus, to the United States Circuit Court of Appeals, Ninth Circuit, at San Francisco, California, and has obtained a writ of error and filed a copy thereof in the clerk's office in said District Court of the United States, to reverse the judgment of the aforesaid suit, and said order denying said writ of habeas corpus, directed to the United States of America and to the Attorney General of the United States, citing said parties to be and appear at a session of the United States Circuit Court of Appeals, Ninth Circuit, to be heard at the city of San Francisco, within thirty days from the 2d day of August, 1921, [17]

Now, the condition of the foregoing obligation is such that if the said defendant, August Bechtold, shall prosecute said writ of error to effect and answer all demands and costs if he fail to make said appeal good, then the above obligation to be void; else to remain in full force and virtue.

AUGUST BECHTOLD.

J. W. MUELLER.

JOHN R. MOYLE.



John R. Moyle and J. W. Mueller, the sureties above subscribed, being duly sworn, say upon oath, each for himself, that he is a resident and freeholder within the State of Montana and is worth the sum specified in the foregoing undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

JOHN R. MOYLE.

J. W. MUELLER.

Subscribed and sworn to before me this 23d day of July, 1921.

[Notarial Seal]

FRANK A. LENZ,

Notary Public in and for the State of Montana,  
Residing at Butte.

My commission expires March 1, 1922.

[Endorsed]: Title of Court and Cause. Bond,  
Approved, Bourquin, J. Filed Aug. 2, 1921. C. R.  
Garlow, Clerk.

---

That thereafter on August 2d, 1921, a writ of error was duly issued herein, which said writ of error is hereto annexed and is in the words and figures as follows, to wit: [18]

In the District Court of the United States for the  
District of Montana.

No. 329.

In the Matter of the Application of AUGUST  
BECHTOLD for a Writ of Habeas Corpus.

**Writ of Error.**

The United States of America,—ss.

The President of the United States of America to  
the Judge of the District Court of the United  
States, for the District of Montana, GREET-  
ING:

Because of the records of an indictment by the Grand Jury of the above-entitled court, empanelled at Butte, Montana, for the September term of the year 1920, charging the defendant, August Bechtold with the violations of Sections 3282, 3258, and 3281 of the revised Statutes of the United States (4 Fed. St. Anno. 44, 24, and 41), on the 12th day of July, 1920, and because of judgment and sentence herein, after conviction, entered November 16, 1920, ordering the defendant to be confined in the county jail at Butte, Montana, for the term of nine months and to pay a fine of \$500.00, and because of an order of this Court denying the defendant's application for a writ of habeas corpus, made and entered on the 25th day of June, 1921, a manifest error hath happened, to the great damage of the said August Bechtold, as appears from the papers herein; we being willing that the error, if any has been committed, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you may have the same at the city of San

Francisco, State of California, thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid be inspected and the said Circuit Court of Appeals may cause further to be done to correct that error, what of right and according to the laws and customs of the United States should be done. [19]

Witness the Hon. WILLIAM H. TAFT, Chief Justice, Chief Justice of the United States, the 2d day of August, in the year of our Lord one thousand nine hundred and twenty-one, and of the Independence of the United States the one hundred and forty-sixth.

[Seal]

C. R. GARLOW,  
Clerk of the District Court of the United States,  
for the District of Montana.

The above writ of error is hereby allowed by

---

District Judge.

Due service of above writ admitted and copy received at Helena, Montana, Aug. 2d, 1921.

W. H. WEIGE,  
Asst. U. S. Attorney for the District of Montana.

### **Answer of Court to Writ of Error.**

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of the said District Court of

the United States, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

C. R. GARLOW,  
Clerk.

By L. Polglase,  
Deputy Clerk. [20]

[Endorsed]: No. 329. In the District Court of the United States for the District of Montana. In the Matter of Application of August Bechtold for a Writ of Habeas Corpus. Writ of Error. Filed Aug. 2, 1921. C. R. Garlow, Clerk. [21]

---

That thereafter, on August 2d, 1921, a citation was duly issued herein, which citation is hereto annexed and is in the words and figures as follows, to wit: [22]

In the District Court of the United States for the  
District of Montana.

No. 329.

In the Matter of Application of AUGUST BECH-  
TOLD for a Writ of Habeas Corpus.

**Citation on Writ of Error.**

The United States of America,—ss.

To HARRY M. DAUGHERTY, Attorney General  
of the United States, and to JOHN L. SLAT-



TERY, United States District Attorney for the District of Montana, and to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office in the District Court of the United States, for the District of Montana, wherein the United States of America is plaintiff and August Bechtold is defendant, to show cause, if any there be, why the judgment and sentence of the Court rendered against the defendant on the 16th day of November, 1920, and the order of said Court denying defendant's application for a writ of habeas corpus, made and entered on the 25th day of June, 1921, as in said writ of error mentioned, should not be corrected and speedy justice be done to the said defendant August Bechtold in that behalf.

Given under my hand in the city of Helena, in the District of Montana, above named, this 2d day of Aug., 1921.

BOURQUIN,

Judge of the District Court of the United States  
for the District of Montana.

Due service of above citation admitted and copy received at Helena, Montana, Aug. 2, 1921.

W. H. WEIGE,

Asst. U. S. Atty., District of Montana. [23]

[Endorsed]: No. 329. In the District Court of the United States for the District of Montana. In the Matter of Application of August Bechtold for a

Writ of Habeas Corpus. Citation. Filed Aug. 2, 1921. C. R. Garlow, Clerk. [24]

---

**Certificate of Clerk U. S. District Court to  
Transcript of Record.**

United States of America,  
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 25 pages, numbered consecutively from 1 to 25, inclusive, is a full, true and correct transcript of all things mentioned in the praecipe for transcript heretofore filed herein, as appears from the original files and records of said court in my custody as such clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Eight and 75/100 Dollars (\$8.75), and have been paid by the plaintiff in error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Butte, Montana, this 16th day of August, A. D. 1921.

[Seal]

C. R. GARLOW,

Clerk.

By L. Polglase,  
Deputy Clerk. [25]

[Endorsed]: No. 3754. United States Circuit Court of Appeals for the Ninth Circuit. August Bechtold, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed August 18, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

AUGUST BECHTOLD,

*Appellant,*

vs.

THE UNITED STATES OF AMERICA,

*Appellee.*

---

**BRIEF OF APPELLANT**

Upon Appeal from the United States District Court  
for the District of Montana.

---

FRANK A. LENZ,

*Appellant's Attorney.*

---

**FILED**

**SEP 30 1921**

**F. D. MONCKTON,**  
CLERK





# United States Circuit Court of Appeals

## For the Ninth Circuit

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AUGUST BECHTOLD,

*Appellant,*

vs.

THE UNITED STATES OF AMERICA,

*Appellee.*

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### BRIEF OF APPELLANT

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FRANK A. LENZ,

*Appellant's Attorney.*

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### STATEMENT OF THE CASE

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This Appeal, whilst made in behalf of one person only, is brought on behalf of all five defendants referred to in the District Court's order denying the petitions for Habeas Corpus and remanding the defendants back to prison from which they had been temporarily released upon the first press report of the Supreme Court's decision in the Yuginovich case. (Transcript pp. 14-18).

The indictments in all five cases are alike and the de-

defendants' punishment, after conviction, the same, to wit: Imprisonment for the term of nine months in the County Jail of Silver Bow County, Montana, and a fine of \$500.

At the time of their temporary release some of these defendants lacked but  $1\frac{1}{2}$  months to the completion of their term; others had served smaller fractions of their terms.

All are allowed to remain at large pending the decision on appeal in the case at bar.

Motions to quash the indictment and demurrers to the same, though not submitted in all of these cases, are taken as denied and overruled by the Court.

No stenographic report of the testimony was made in these cases and there is no assignment of errors other than contained in Appellant's application for Habeas Corpus. (Transcript p. 10).

## THE ARGUMENT

The indictment fixes the time of the commission of the offenses on the 12th day of July, 1920. (Transcript p. 2), the date of arrest, and the Court takes cognizance of the fact that this was: "all of date since the Volstead Act." (Transcript p. 14).

But, the decision explains: "The gist of the offences charged are not the accuseds' acts of commission, but are their acts of omission." (Transcript p 15).

This construction is in direct contradiction to the language of the first and third counts of the indictment, to-wit:

(a) "unlawfully and feloniously *did* make and ferment a certain mash" and

(b) “*did* unlawfully and feloniously carry on the business of a distiller by producing distilled spirits and making a mash.”

These were the actual commissions of offenses prohibited by the XVIII Amendment to the Constitution of the United States which went into effect on the 17th day of January, 1920, and by the Statute of October 28th, 1919 (chapter 85) enforcing that amendment, and the modifying statements in the indictment:

(a) “in a certain building other than a distillery, duly authorized according to law,” etc., and

(b) “without having given bond, as required by law,” are the Appellee’s arbitrary classification of the offenses under Sections 3282 and 3281 of the Revenue Laws (4 Fed. St. anno., pp. 44 and 41).

These are the two sections, the application of which in connection with these offenses has been adversely decided in the Yuginovich case, June 1, 1921. (United States vs. Bozo Yuginovich, 65 L. ed. 679; Advance opinions 1920-21, July 1, 1921).

“Neither that indictment nor any of these at bar, contains a word or fair inference that the object of these offenses otherwise fully charged is to devote the liquor to beverage purposes, etc.” (Court’s opinion, Transcript p. 15).

The defendant plaintiff in error and the other defendants concerned were arrested for:

1. making and fermenting mash.
2. having then and there in their possession and under their control a certain still set up.

3. unlawfully and feloniously carrying on the business of a distiller,  
all offenses prohibited by the Volstead Act. They were not arrested for not registering their premises and stills and for not procuring a license, as prescribed by the Revenue Laws, nor is it to be assumed that they would have committed any offense against the Revenue Laws, if the registering of their places and the securing of licenses could be had for other than manufacturing purposes, to wit: for beverage purposes.

As part of the regulations for the manufacture and sale of liquors specifically allowed by the Volstead Act, Sec. 3258 R. S. is amongst those enumerated in Sec. 39 of said Act which are to remain in full force and effect, but the indictment does not contain "one word of fair inference," in the language above quoted, of an unlawful act for lawful purposes, to wit: making whiskey for manufacturing or medicinal purposes, an omission on the part of the Government just as fatal as the omission of the words "for beverage purposes."

The above numbered second cause of arrest has been arbitrarily classified as an offense forbidden by Section 3258 R. S., by the words: Having — a still set up, *which was not then and there registered, as required by law.*

"It appears upon the face of the indictment in this case that the unlawful acts charged were committed after the 17th day of January, 1920, when the XVIII amendment of the Constitution of the United States and the Statute of October 28, 1919, enforcing that amend-

ment, took effect. (U. S. vs. Windham, 264 Fed. Rep. 376.)

The indictment in that case charges a violation of Sections 3258, 3279, 3281, R. S. (Comp. Stat., Secs. 5994, 6019, 6021.)

The Court's opinion in that case covers the present case fully. "The entire system of deriving a revenue from taxes imposed on such production and use for beverage purposes has been abrogated. On the 28th day of October, 1919, a statute was enacted covering the entire ground in providing for the inhibition of all liquors containing over one-half of one per cent of alcohol for beverage purposes, and for its permitted manufacture and use in the restricted applications allowed, exclusive of beverage purposes.

"The general rule for the construction of the Statutes is that, when a later Statute is enacted, inconsistent with one preceding it, and covering the entire ground of the subject matter, it supersedes and implicitly repeals the preceding Statute. Especially is this the case when the later Statute imposes penalties of less severity for the same offenses; the rule in favor of clemency being that, where different penalties are imposed for the same offense, the lighter penalty, when imposed in a later Statute, is presumed to supersede the earlier and heavier."

In *United States vs. Yuginovich*, 65 L. Ed. 679; Sup. Ct. Advance Opinions, July 1, 1921, the Supreme Court through Mr. Justice Day, who wrote the opinion, uses the following language concerning the applicability of Sec. 3257, Rv. St. (Fed. St. Anno. 23), which provides



the punishment for defrauding or attempting to defraud the United States of the tax on spirits, which is equally applicable to Sec. 3258, Rev. St. (4 Fed. St. Anno. 24), which provides the punishment for the unlawful possession, custody or control of any distilling apparatus, etc.; which latter statute we claim is superseded by Sec. 25 of the Volstead Act:

“The question remains concerning the applicability of Sec. 3257, involving the right to punish for attempting to defraud the United States of a tax. Did Congress intend to punish such violation of law by imposing the old penalty denounced in Sec. 3257, or as provided in the new and special provision enacted in the Volstead Act ?

It is the contention of the government that Sec. 35 saves the right to prosecute as to taxes, as well as the acts charged as violative of the other sections of the Revised Statutes, because of the phrase with which the section concludes: “. . . nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.”

“It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones, when clearly inconsistent with the earlier enactments. (*United States v. Tynen*, 11 Wall, 88, 20 L. Ed. 153). In construing penal statutes, it is the rule that later enactments repeal former ones, practically covering the same acts, but fixing a lesser penalty. The concluding phrase of section 35 (of the Volstead Act), by itself considered, is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the constitutional provision

contained in the 18th amendment, and in view of the provision of the Volstead Act intended to make that amendment effective.”

Counsel for plaintiff in error respectfully submits that the arrest made on July 12, 1920, was made in compliance with Sec. 3 of Title II of the Volstead Act.

“Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, *manufacture*, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

He was accused of making whiskey, as evidenced by the still and mash (in some of the other cases also by the finished product) found on his place. Under this charge he was brought before the United States Commissioner and was held to answer to the United States District Court for the District of Montana under bond.

More than two months later he finds himself indicted for infraction of the old Revenue laws, which in his case he could not have complied with, since the 18th amendment to the Constitution and the Volstead Act went into effect. To which indictment he pleaded “not guilty,” but was found guilty and punished.

All provisions of the Volstead Act shall be liberally construed to the end that the use of intoxicating liquors as a beverage may be prevented. So that, where liquor is unlawfully manufactured it must, in the absence of all

indications that it is manufactured for a lawful purpose, be held that it is to be used or might be used for beverage purposes.

In this connection, then, the sections of the revenue laws under which the indictment herein was found, are clearly inconsistent with the provisions of the Volstead Act and the 18th amendment to the Constitution, and are superseded by them.

Respectfully submitted,

FRANK A. LENZ,

*Appellant's Attorney.*

In the  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit** 3

---

AUGUST BECHTOLD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

**Brief of Appellee**

UPON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE DISTRICT  
OF MONTANA

---

Appearances:

JOHN L. SLATTERY,  
United States Attorney.

RONALD HIGGINS,  
Assistant United States Attorney.

WELLINGTON H. MEIGS,  
Assistant United States Attorney.  
Attorneys for Appellee.

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**FILED**

**OCT 10 1921**

**F.D. MONCKTON,**  
CLERK.





**In the  
United States  
Circuit Court of Appeals  
For the Ninth Circuit**

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AUGUST BECHTOLD,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

**Brief of Appellee**

---

There is no assignment of errors filed in this cause, and it is therefore submitted that there is nothing before the court for review. The habeas corpus proceeding is a collateral attack upon the judgment of the court entered on the conviction of Bechtold for the violation of Sections 3258, 3281 and 3282 of the Revised Statutes. The record does not disclose that a motion to quash the indictment was interposed, or a demurrer filed, or a motion made in arrest of judgment, so that the judgment is first attacked by the petition for the writ of habeas corpus.

The court below had jurisdiction of the offense and of the person of the accused, and despite the contention of the appellant that the three sections of the Revised Statutes above referred to "are clearly inconsistent with the provisions of the Volstead Act and the Eighteenth Amendment to the Constitution, and are superseded by them," nevertheless, this appeal comes within the rule laid down in the case of *Hopkins v. M'-Claghry*, 209 Fed. 821, (C. C. A. 8th), in which case one Hopkins, who was confined in the United States Penitentiary at Leavenworth, Kansas, on conviction and sentence for embezzlement and abstraction, under Sec. 5209 of the Revised Statutes, instituted a habeas corpus proceeding before the United States District Court of Kansas to secure his release, claiming that his imprisonment was unlawful, because the indictment was fatally defective. The court in the course of the opinion said:

"Without intimating that the indictment was in any wise defective, it must be remembered that this is a collateral rather than a direct attack. In *re Frederich*, 149 U. S. 70, 13 Sup. Ct. 793, 37 L. Ed. 653; *Savin, Petitioner*, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150; *United States v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631. No objection was ever made to the indictment in any way in the District Court for the northern District of Ohio, Eastern Division, when it was returned, the petitioner arraigned, pleaded guilty, and was sentenced. The indictment is first assailed on this collateral attack."

And, the Court quoted from *Ex parte Yarbrough*,

110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274, as follows:

“Whether the indictment sets forth, in comprehensive terms, the offense which the statute describes and forbids, and for which it prescribes a punishment, is in every case a question of law which must necessarily be decided by the court in which the case originates, and is therefore clearly within its jurisdiction. Its decision on the conformity of the indictment to the provisions of the statute may be erroneous, but, if so, it is an error of law, made by a court acting within its jurisdiction, which could be corrected on a writ of error if such writ was allowed, but which cannot be looked into on a writ of habeas corpus limited to an inquiry into the existence of jurisdiction on the part of the court.”

And, from *Re. Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274:

“In all such cases, when the question of jurisdiction is raised, the point to be decided is whether the court has jurisdiction of that class of offenses. If the statute has invested the court, which tried the prisoner, with jurisdiction to punish a well-defined class of offenses, as forgery of its bonds or perjury in its courts, its judgment as to what acts were necessary under these statutes to constitute the crime is not reviewable on a writ of habeas corpus.”

And also from the case of *Dimmick v. Tompkins*, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110:

“It is also objected that the facts charged in either the first or fourth count of the indictment did not constitute any offense under the statute, and that the sentence was therefore without jurisdiction. We are not by any means prepared to ad-

judge that the indictment did not properly charge an offense in both the first and fourth counts. See *Dimmick v. United States*, 116 Fed. 825 (54 C. C. A. 329), involving this indictment, where it is set forth. It is not, however, necessary in this case to decide the point for the indictment charged enough to show the general character of the crime, and that it was within the jurisdiction of the court to try and to punish for the offense sought to be set forth in the indictment. If it erroneously held that the indictment was sufficient to charge the offense, the decision was within the jurisdiction of the court to make, and could not be reexamined on habeas corpus. The writ cannot be made to do the office of a writ of error. Even though there were, therefore, a lack of technical precision in the indictment in failing to charge with sufficient certainty and fullness some particular fact, the holding by the trial court that the indictment was sufficient would be simply an error of law, and not one which could be re-examined on habeas corpus."

The court in the case at bar was acting within its jurisdiction in determining that the Volstead Act repealed sections 3258, 3281 and 3282 of the Revised Statutes only to a limited degree. It will be conceded however, that the lower court had jurisdiction to try and punish for the offense sought to be set forth in the indictment, no matter whether the offense be held to be in violation of the Internal Revenue Laws or of the National Prohibition Act. Hence, applying the principle laid down in *Dimmick v. Tompkins*, *supra*, if the lower court "erroneously held that the indictment was sufficient to charge the offense, the decision was within the jurisdiction of the court to make, and could not be re-examined on habeas corpus. The

writ cannot be made to do the office of a writ of error."

The decision of the Supreme Court in the case of *United States v. Yuginovich*, 41 Sup. Ct. 551, lends no aid to the appellant, for that case merely holds that certain sections of the Revised Statutes are partially repealed by the National Prohibition Act; two of the sections of the Revised Statutes involved in that case being involved here, viz., sections 3281 and 3282.

In the *Yuginovich* case the indictment was construed by the lower court "upon the assumption that the charges had relation to *intoxicating liquors intended for beverage purposes*." and that view was followed by the Supreme Court. Whether or not the language of the indictment in that case justified the assumption, is beside the question, because in the case at bar no mention whatsoever is made in the indictment, nor can the language therein be construed to mean that the pleader intended to refer to "*intoxicating liquor for beverage purposes*."

The first count of the indictment in the case at bar charges Bechtold with making and fermenting a certain mash fit for the production of spirits in a certain building other than a distillery, duly authorized according to law, and on premises other than a distillery, duly authorized according to law.

The second count charges that Bechtold failed and neglected to register with the Collector of Internal Revenue a still which he had in his possession and under his control, which still was set up.



The third count charges him with carrying on the business of a distiller without having given the bond required by law.

*It will be observed that there is not a single reference in any of these counts to "intoxicating liquors intended for beverage purposes."* Hence, the Yugovich case has no application to the case at bar, even though it should be held that the habeas corpus proceeding is not a collateral attack upon the judgment herein.

Resuming, it is respectfully submitted that this appeal should not be considered because the transcript contains no assignment of errors, and that the judgment should be affirmed, because,

First, the habeas corpus proceeding is a collateral attack upon the judgment, and

Second, the indictment states facts sufficient to constitute a public offense under sections 3258, 3281 and 3282 of the Revised Statutes, which are unaffected by the National Prohibition Act, and are otherwise not repealed.

JOHN L. SLATTERY,  
RONALD HIGGINS,  
WELLINGTON H. MEIGS,  
Attorneys for Appellee.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

J. W. WILLIS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the  
District of Montana.

FILED

SEP 11 1921

F. O. MONKTON,

CLERK.



**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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J. W. WILLIS,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

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**Transcript of Record.**

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**Upon Writ of Error to the United States District Court of the  
District of Montana.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

FRANK HUNTER, Esq., of Miles City, Montana,  
and Messrs. McINTIRE and MURPHY, and  
LESTER H. LOBLE, Esq., of Helena, Mon-  
tana,

For Defendant and Plaintiff in Error.

J. L. SLATTERY, Esq., U. S. Attorney, RONALD  
HIGGINS, Esq., Assistant U. S. Attorney, and  
W. H. MEIGS, Esq., Assistant U. S. Attorney,  
of Helena, Montana,

For Plaintiff and Defendant in Error.

[1\*]

---

In the District Court of the United States in and  
for the District of Montana.

No. 3815.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. WILLIS,

Defendant.

BE IT REMEMBERED, that on May 10th, 1921,  
an information was duly filed herein against the  
defendant, in the words and figures following, to  
wit:

---

\*Page-number appearing at foot of page of original certified Transcript  
of Record.



In the District Court of the United States, District  
of Montana.

**Information.**

United States of America,  
District of Montana,—ss.

BE IT REMEMBERED, that George F. Shelton, United States Attorney for the District of Montana, who for the said United States, in its behalf, prosecutes in his own person, comes here into the District Court of the United States for the District of Montana, on the 10th day of May, 1921, in the February, 1921, term of said court, held at the city of Butte, in the State and District of Montana, and for the United States of America, gives the Court to understand and be informed:

That on or about the 19th day of March, 1921, one J. W. Willis, whose true name is to the informant unknown, in the State and District of Montana, and within the jurisdiction of this Court, at No. 511 Pacific Avenue, in the City of Miles City, in the County of Custer, in said State and District of Montana, did then and there maintain a [2] common nuisance, that is to say, a building where intoxicating liquor, to wit, whiskey, was kept and sold, in violation of Title II of the National Prohibition Act, the maintaining of said common nuisance being then and there prohibited and unlawful; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

GEORGE F. SHELTON,  
U. S. Attorney, District of Montana.

United States of America,  
District of Montana,—ss.

George F. Shelton, being first duly sworn, on oath deposes and says.

That he is a duly appointed, qualified and acting United States Attorney for the District of Montana, and as such makes this verification to the foregoing information; that he knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

GEORGE F. SHELTON.

Subscribed and sworn to before me this 10th day of May, 1921.

[Seal]

H. H. WALKER,  
Deputy Clerk, U. S. District Court, District of Montana.

Filed May 10, 1921. C. R. Garlow, Clerk. [3]

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Thereafter, on June 15, 1921, defendant was duly called for arraignment, the minute entry thereof being as follows, to wit:

No. 3815.

UNITED STATES

vs.

J. W. WILLIS.

**Arraignment.**

Defendant was duly called for arraignment this day, whereupon Frank Hunter, Esq., asked that his

name be entered as attorney for defendant, and it was so ordered. Thereupon counsel was granted leave to file motion to quash, which was set for hearing at 10 A. M. to-morrow.

---

Thereafter, on June 16, 1921, the plea of defendant was duly entered herein, the minute entry thereof being as follows, to wit:

No. 3815.

UNITED STATES

vs.

J. W. WILLIS.

**Plea.**

This cause came on regularly for hearing this day on motions to quash the information and suppress certain evidence, J. L. Slattery, Esq., U. S. Attorney, appearing for plaintiff, and Frank Hunter, Esq., appearing for defendant. Thereupon the motions were argued and submitted, whereupon the Court, after due consideration, ordered that said motions be denied. Thereupon a plea of not guilty was entered on behalf of said defendant, the case to be tried in July.

Thereafter, on July 12th, 1921, the case came on regularly for trial, the minute entry thereof being as follows, to wit:

No. 3815.

UNITED STATES

vs.

J. W. WILLIS.

**Trial.**

This cause came on regularly for trial this day, defendant present with his attorney, Frank Hunter, Esq., and J. L. Slattery, Esq., U. S. Attorney, appearing for plaintiff. Thereupon, on motion, the name of H. G. Murphy, Esq., was entered as additional [4] counsel for defendant. Thereupon the following were duly impanelled, accepted and sworn as a jury to try the cause, viz.: James M. Forbes, L. T. Hauberg, Chas. Oliver, F. A. Rodgers, Jacob Fischer, J. W. E. Clark, John Adami, George Thompson, Thomas Smelser, John W. Fulton, Alex Erickson and Owen Evans. Thereupon Walter Prochnow, Geo. W. Farr, Walter Holmes, Geo. H. Estes, O. M. Wilkinson, Martin Golden, H. M. Dengler, C. S. Hanna and T. R. Gordon were sworn and examined as witnesses for the plaintiff and three bottles containing whiskey were introduced, whereupon plaintiff rested. Thereupon J. W. Willis, Richard Bernhart, Melvin Drinkhart, J. English, Elizabeth Drake and Frank Hunter were sworn and examined as witnesses for defendant, whereupon defendant rested. Thereupon Berl

Henderson was sworn and examined and T. R. Gordon recalled in rebuttal, whereupon the evidence being closed, after the arguments of counsel and the instructions of the Court, to certain of which defendant then and there excepted and exception noted, the jury retired to consider of their verdict. Thereafter the jury returned into court with its verdict, which was duly received by the Court, read and filed, and by the jury acknowledged to be its true verdict as follows, to wit: "We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the information on file herein. Jacob Fischer, Foreman." Thereupon on motion of defendant, time for sentence was ordered continued until 9:30 A. M. to-morrow.

---

Thereafter, on July 12, 1921, the verdict of the jury was filed herein, being in the words and figures following, to wit:

In the District Court of the United States, District  
of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. WILLIS,

Defendant.

**Verdict.**

We, the jury in the above-entitled cause, find the



defendant guilty in manner and form as charged in the information on file herein.

JACOB FISCHER,

Foreman.

Filed July 12, 1921. C. R. Garlow, Clerk. [5]

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Thereafter, on July 13, 1921, judgment was duly rendered and entered herein as follows, to wit:

No. 3815.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. WILLIS,

Defendant.

### **Judgment.**

The United States Attorney with the defendant and his counsel present in court.

The defendant was thereupon duly informed by the Court of the nature of the charge against him as appears in the information herein, and of his arraignment, and plea of not guilty, and of his trial and the verdict of the jury of guilty as charged.

And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendant having been duly convicted in this court of the offense of un-

lawfully maintaining a common nuisance, that is to say, a building where intoxicating liquor, to wit, whiskey, was kept and sold in violation of the National Prohibition Act, committed on the 19th day of March, 1921, at Miles City, in the State and District of Montana, as charged in the information herein:

It is therefore CONSIDERED, ORDERED, AND ADJUDGED that for said offense, you, the said J. W. Willis, be confined and imprisoned in the County Jail at Helena, Montana, for the term of Eight Months, and that you pay a fine of Two Hundred Fifty Dollars, and costs taxed at \$471.81, and that you be confined in said County Jail until said fine is paid or you are otherwise discharged according to law.

Judgment rendered and entered July 13, 1921.

C. R. GARLOW,  
Clerk. [6]

---

Thereafter, on July 30th, 1921, petition for writ of error was duly filed herein, in the words and figures following, to wit:

In the District Court of the United States, for the  
District of Montana.

UNITED STATES OF AMERICA,  
Plaintiff,

vs.

J. W. WILLIS,

Defendant.

**Petition for Writ of Error.**

To the Honorable GEORGE M. BOURQUIN,  
United States District Judge of the District  
Court Aforesaid:

Now comes J. W. Willis by his attorneys and respectfully shows that heretofore on the 12th day of July, 1921, he was convicted in the above-entitled court and cause by a jury for an alleged violation of the national prohibition law, and thereafter on the 13th day of July, 1921, judgment was by said Court rendered and entered against him upon the verdict of said jury.

And your petitioner feeling himself aggrieved by the said verdict and judgment entered herein as aforesaid herewith petitions this Honorable Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under and in pursuance of the laws of the United States in said cases made and provided.

WHEREFORE, the premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals for the Ninth Circuit sitting at the city of San Francisco, in the State of California, for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by petitioner in error, conditioned as the law directs, and upon giving such bond as may be required, that all further [7] proceedings may be suspended

until the determination of said writ of error by the Circuit Court of Appeals of the United States for the Ninth Circuit, as aforesaid, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said United States Circuit Court of Appeals aforesaid, and your petitioner will ever pray.

J. W. WILLIS,

Petitioner in Error.

LESTER H. LOBLE,

FRANK HUNTER,

McINTIRE and MURPHY,

Attorneys for Petitioner in Error.

Filed July 30, 1921. C. R. Garlow, Clerk. [8]

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Thereafter, on July 30, 1921, assignment of errors was filed herein, in the words and figures following, to wit:

In the District Court of the United States, for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. WILLIS,

Defendant.

### **Assignment of Errors.**

Comes now J. W. Willis, the defendant above named, by his attorneys, and in connection with his petition for a writ of error makes, presents and files this, his assignment of errors, and by way

thereof he avers and alleges that in the record and proceedings, and in the judgment of said District Court in said cause there is manifest error in this, to wit:

I.

That the evidence in said cause is not sufficient as a matter of law to warrant the verdict of the jury or the judgment of the Court against this defendant.

II.

That there is no substantial evidence in said cause upon which to base the verdict of the jury or the judgment of the Court as to this defendant.

III.

The Court erred in overruling defendant's objection to the testimony of the witness Berl Henderson given in rebuttal on the trial of said cause.

IV.

The Court erred in denying defendant's motion to strike the testimony of the witness Henderson given in rebuttal on the trial of said cause. [9]

V.

The Court erred in giving to the jury that part of its instructions which are as follows, to wit:

“In respect to the law involved in this case, the famous Volstead Act, passed by Congress to carry out the provision for national prohibition, it is a Constitutional amendment, and it is just as much a law as any other law upon our statutes. We all know that no law ever written is being violated or has been violated to a greater degree than the Volstead Law is



now; but that is only the more reason why it must be enforced, as long as it is the law, with diligence and faithfulness, so that this tendency to violate this law may not, as it inevitably will if its violations are condoned or permitted to continue unpunished, tend to encourage the violation of other laws; because, when people discover that one law may be violated with impunity, that courts and juries are impotent to enforce the law, there is a general tendency to transgress other laws, a failure to give due observance to law, and, as a result, a breaking down of the morale. In other words, if a man may break the law and escape the consequences of his act, people say, 'What is the use? If one set of men can violate one law and escape, what is the use of the rest of us observing any law?' So it leads to the violation of other laws, and a breakdown of the morale of the people. Another thing in reference to this Volstead Act: People comment upon the fact that with many people it is not a popular law; many people are opposed to its spirit. They argue about this way,—that if they are drawn in the jury box in a case involving a prosecution for the violation of its provisions, they will return a verdict of acquittal; that they are against the spirit and operation of the law; that it is nor right, so they will fail to enforce the law, and will permit the offender to escape. They argue to themselves further: 'If I am accused of a violation of this law, it will only

be necessary for me to swear to any sort of a fictitious defense to give the jury a plausible excuse in order to secure my acquittal.'

Gentlemen of the jury, that is a thing that wants to be suppressed as not well founded. I will say that in the Federal Court I have not found it to have any basis of truth, so far as juries are concerned. Of cases that have come up in this court, there have been as many convictions that were merited under this law, as in any other case. Why do I say this to you? Not to say that this defendant is to be convicted; not at all. I merely wish to impress upon you the seriousness of your duty in every one of these cases as in any other question that may be brought before you, and that you give to it the same serious, thoughtful and honest consideration; that you execute and carry out your duty, your obligation and your oath, whatever the verdict may be."

to which portion of said instructions the defendant made the following objections and exceptions, to wit:

"Mr. MURPHY.—If your Honor please, the defendant desires [10] to except to that portion of your Honor's instructions in which you commented upon the Volstead law, and particularly that portion in which you state that that law is being violated more than any other law now is. Defendant further desires to except to your Honor's comments on the Volstead Law to the effect that violations of it are breaking

down the morale of the people and the general observance of law, and that there is a spirit not to enforce that law.”

#### VI.

The Court erred in overruling defendant’s objection and exception to that portion of its charge to the jury which is set forth at length in Specifications of Error numbered 5 herein.

#### VII.

The Court erred in giving to the jury that part of its instructions which are as follows, to wit:

“Ask yourselves this: whether Smith, who took them there and introduced Henderson and the others to the defendant in the first place, whether or not Smith was the agent of the defendant. Ask yourselves how these officers would find their way there if they were not taken there by someone who knew the liquor was there. Why did the defendant tolerate these men around there unless they were customers, whose patronage, at fifty cents a drink, was a profitable one.” to which portion of said instruction defendant made the following exceptions, to wit:

“We further except to that portion of your charge wherein you comment upon the fact and mention the fact that Vic Smith was the agent of the defendant, because I do not believe the same was warranted or justified by the evidence.”

#### VIII.

The Court erred in overruling defendant’s exceptions and objections to that portion of its charge to

the jury which is set forth in Specifications of Error numbered 7 herein.

IX.

The Court erred in rendering and entering judgment herein for the reason that there is no sufficient evidence herein to justify or sustain said judgment.

X.

The Court erred in rendering and entering the judgment [11] herein for the reason that there is no evidence to justify or sustain the verdict of the jury.

XI.

The Court erred in rendering and entering judgment herein for the reason that the verdict herein is contrary to law.

XII.

The Court erred in rendering and entering judgment herein for the reason that the same is contrary to law.

XIII.

The Court erred in rendering and entering judgment herein against defendant.

WHEREFORE and for divers other reasons appearing in the record and proceedings herein said plaintiff in error prays that the judgment of the District Court in favor of the said United States and against said defendant be reversed and set aside and for such other relief as may be just.

Dated July 30, 1921.

LESTER H. LOBLE,  
FRANK HUNTER,  
McINTIRE & MURPHY,

Attorneys for Plaintiff in Error, Defendant in Court  
Below.

Filed July 30, 1921. C. R. Garlow, Clerk. [12]

---

Thereafter, on July 30, 1921, order allowing writ of error was filed herein, as follows, to wit:

In the District Court of the United States for the  
District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. WILLIS,

Defendant.

**Order Allowing Writ of Error and Fixing Bond.**

Upon motion of McIntire and Murphy, the attorneys for the above-named defendant, and upon the filing of a petition for a writ of error and an assignment of errors, IT IS HEREBY ORDERED that writ of error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein and that a transcript of the records, proceedings and papers in this cause duly authenticated be sent to the said United States Cir-



cuit Court of Appeals for the Ninth Circuit and that the amount of the bond on said writ of error to be furnished by the said defendant be and the same is hereby fixed at the sum of 750.00 dollars (\$———), and upon due execution and approval of said bond the same shall amount as supersedeas herein pending proceedings upon said writ of error in said Circuit Court of Appeals.

Dated Helena, Montana, this 30th day of July, 1921.

BOURQUIN,

Judge.

Filed July 30, 1921. C. R. Garlow, Clerk. [13]

---

Thereafter, on July 30, 1921, bond on writ of error was filed herein, in the words and figures following, to wit:

In the District Court of the United States for the  
District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. WILLIS,

Defendant.

**Bond.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, J. W. Willis, as principal, and M. W. Milligan and Hugh R. Wells, of the City of Miles City, County of Custer, State and District of Montana, as sureties, are held and firmly bound to the

United States of America in the full and just sum of Seven Hundred Fifty Dollars (\$750.00), lawful money of the United States, to be paid to the said United States of America, for which payment, well and truly to be made, we bind ourselves, our executors, administrators, heirs and assigns jointly and severally by these presents.

Signed and sealed this 28th day of July, 1921.

WHEREAS, lately at a term of the District Court of the United States for the District of Montana sitting at Helena in said District in a suit pending in said court, in which the United States of America is plaintiff, and said J. W. Willis, defendant, being cause numbered 3815, in which the said defendant was charged with maintaining a nuisance in violation of the National Prohibition Act, and upon a trial thereof and a verdict of guilty was returned by a jury and judgment was rendered against said defendant by the Court that said defendant be imprisoned in the common jail of Lewis and Clark County, Montana, for a period of eight months and to pay a fine of Two Hundred and Fifty Dollars (\$250.00) [14] and the costs of suit, and the said J. W. Willis has or is about to file in said court his petition for and obtain a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit and obtain a citation directed to the United States of America citing it to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit to be held in the city of San Francisco, in the State of California, according to law within thirty days from the date thereof.

NOW, THEREFORE, the condition of this obligation is such, that if the said J. W. Willis shall prosecute his writ of error to effect and pay the said judgment for said fine and costs and surrender himself in execution of the judgment heretofore entered herein against him and pay the costs and damages of the United States of America in said Circuit Court of Appeals for the Ninth Circuit, in the event he fails to make good his plea in said writ of error, or on a dismissal thereof, then the above obligation to be void; otherwise to remain in full force and effect.

J. W. WILLIS.

M. W. MILLIGAN.

HUGH R. WELLS. [15]

State of Montana,  
County of Custer,—ss.

M. W. Milligan and Hugh R. Wells, being first duly sworn, each for himself, deposes and says: That he is a resident and freeholder within the county of Custer, State and District of Montana; that he is worth the amount of Seven Hundred Fifty Dollars (\$750.00), which is double the sum specified in the foregoing bond as the penalty thereof, over and above all his just debts and liabilities exclusive of property exempt from execution.

M. W. MILLIGAN.

HUGH R. WELLS.

Subscribed and sworn to before me this 28th day of July, 1921.

[Notarial Seal]                      FRANK HUNTER,  
Notary Public for the State of Montana, Residing  
at Miles City, Montana.

My commission expires March 29, 1922.

United States of America,  
District of Montana,—ss.

I, \_\_\_\_\_ United States Commissioner, do  
hereby approve the foregoing bond as to the suffi-  
ciency of the sureties therein mentioned.

\_\_\_\_\_,  
United States Commissioner, Miles City, Mon-  
tana.

Filed July 30, 1921. C. R. Garlow, Clerk. [16]

\_\_\_\_\_  
Thereafter, on July 30, 1921, writ of error was  
duly issued herein, which writ is hereto annexed  
and is words and figures following, to wit:

In the District Court of the United States for the  
District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. WILLIS,

Defendant.

**Writ of Error.**

United States of America,—ss.

The President of the United States of America to the United States of America, Defendant in Error, and the Honorable JOHN L. SLATTERY, United States Attorney for the District of Montana, Its Attorney, GREETING:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in said District Court before you between the United States of America, plaintiff, and J. W. Willis, defendant, a manifest error has happened to the damage of said J. W. Willis as by his complaint and petition appears, and we being willing that error, if any hath been, should be corrected and full and speedy justice be done to the aforesaid parties in this behalf, do command you if judgment be therein given that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same at San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in said Circuit Court of Appeals to be then and there held, and the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein according to law [17] what of right and according to the laws and customs of the United States should be done.



WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 30th day of July, 1921.

[Seal] C. R. GARLOW,  
Clerk of the United States District Court, District  
of Montana. [18]

---

**Answer of Court to Writ of Error.**

The Answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is within made, with all things touching the same, I certify, under the seal of the said District Court of the United States, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal]

C. R. GARLOW,  
Clerk.

By H. H. Walker,  
Deputy. [19]

[Endorsed]: No. 3815. U. S. District Court, District of Mont. United States of America vs. J. W. Willis, Deft. Writ of Error. Filed July 30th, 1921. C. R. Garlow, Clerk. [20]

Thereafter, on July 30, 1921, a citation on writ of error was duly issued herein, which citation is hereto attached and is in words and figures following, to wit:

In the District Court of the United States for the  
District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. WILLIS,

Defendant.

**Citation on Writ of Error.**

United States of America,—ss.

The President of the United States of America to the United States of America, Defendant in Error, and the Honorable JOHN L. SLATTERY, United States Attorney for the District of Montana, Its Attorney, GREETING:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Montana, wherein J. W. Willis is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in said writ of error mentioned should not be corrected and why

speedy justice should not be done to the parties in that behalf.

Dated this 30th day of July, 1921.

BOURQUIN,  
Judge. [21]

[Endorsed]: No. 3815. U. S. District Court, District of Montana. United States of America vs. J. W. Willis, Deft. Citation on Writ of Error. Filed Aug. 1st, 1921. C. R. Garlow, Clerk.

Due service of within Citation and receipt of copy thereof this 1st day of Aug., 1921, is hereby admitted and acknowledged.

JOHN L. SLATTERY,  
U. S. Attorney for Montana. [22]

---

Thereafter, on August 11, 1921, bill of exceptions was duly signed, settled and allowed and filed herein, being in the words and figures following, to wit:

In the District Court of the United States for the  
District of Montana.

THE UNITED STATES OF AMERICA  
versus

J. W. WILLIS,

Defendant.

**Bill of Exceptions.**

Before Honorable GEORGE M. BOURQUIN,  
Judge Presiding, and a Jury.

JOHN L. SLATTERY, Esq., United States District Attorney.

Messrs. McINTYRE & MURPHY (HOMER G. MURPHY, Esq., Appearing), Attorneys for Defendant.

This cause came on regularly for trial in the above-entitled court on the twelfth day of July, A. D. 1921, John L. Slattery, Esq., United States Attorney, appearing as counsel for the United States of America, and the defendant appearing in person and by his counsel above named, whereupon the following proceedings were had therein and evidence adduced, to wit:

A jury was duly impaneled, examined, accepted and sworn to try said cause, and the following proceedings were had: [23]

**Testimony of Walter Procknow, for the Government.**

WALTER PROCKNOW, a witness produced on behalf of the Government in the foregoing entitled cause, having been first duly sworn, was examined in chief by Mr. Slattery, and testified as follows, to wit:

**Direct Examination.**

(By Mr. SLATTERY.)

My name is Walter Procknow. I live at Miles City, Montana, in the District of Montana. During the month of March, of this year, I was an officer of Miles City. I held the office of patrolman throughout the month of March. I have lived in Miles City twelve years.

I have known the defendant since 1913, and I know where he was living, in Miles City, in the

(Testimony of Walter Procknow.)

month of March, of this year. I couldn't give the number of the place at which he was living, but it is a small, two-room, green house, just one story. I was in that house on the nineteenth of March, of this year. City Attorney Farr, Walter Holmes, Mr. English and Mayor Wilkinson were with me at that time. When I went to the house, I went to the back door. I did not see the defendant in there, but I saw him in that house on that evening. The time was eleven-thirty when I went to his house. Mr. Willis was in the house there then. There was a woman in there with him; I just can't recall her name. In the kitchen of the house, in the nature of bottles or liquors, we found some jugs, and there were quite a few empty bottles. In the kitchen we didn't find any empty bottles; I did not find any myself, personally, in the kitchen; I found some in the front room. We found about forty bottles, and we seized twelve quart bottles of whiskey with green river labels, Green River whiskey. I smelled some of the jugs and empty bottles on that occasion. They [24] led me to conclude that they had recently had liquor in them. On that occasion I arrested the defendant and this woman I found there. I picked up and took away two bottles of home brew.

Cross-examination.

(By Mr. MURPHY.)

There were about forty bottles, empty bottles, there, but we didn't take them all away. Those bottles were of all kinds. I found five empty jugs.



(Testimony of Walter Procknow.)

Q. And you said you found twelve quarts of Green River whiskey? A. Empty bottles.

Q. Empty bottles? A. Yes, sir.

Q. There was nothing in those?

A. In some there were; there was liquor in some of them.

Q. There had been, from the labels on them?

A. Yes, sir.

The WITNESS.—(Continuing.) I did not open those two bottles of home brew. I could tell what the contents of those were by the sediment on the bottom; I didn't open them or taste them. There were two rooms in that house; one room must be twelve by ten, and the other is about six by ten, I think.

Q. And how were those rooms furnished?

A. Why, there was, on the left hand side there was a little table with a telephone on it. On the right there was a writing desk and a trunk and a bed; that is the front room.

The WITNESS.—(Continuing.) In the back room there was a stove, and on the right hand of the stove there was a cupboard, and then there was a cot in the corner. There were some dishes and cooking utensils. Willis made that his home. As a matter of fact, Mr. Willis had just come back from California recently. The six by ten room was the one where the kitchen stove was. That wasn't a very [25] large table. That was Mr. Willis' home. I didn't notice any glassware around there. The lady was in the front room. As I came in there

(Testimony of Walter Procknow.)

she was dressed. I don't know whether she was going out. She went to jail with the rest of them.

Redirect Examination.

(By Mr. SLATTERY.)

I did not notice any evidence of the lady who was in there having been drinking. I didn't notice any liquor on the defendant at that time. Mr. Farr opened it; it was after a request was made of the defendant to open it. He did not comply with the request. It was locked. Upon breaking open the cupboard, there was found inside of it a five gallon jug with white liquid in it, moonshine whiskey in it. That was locked up in this cupboard in this kitchen. When I arrested them, I went away, but I left someone behind me; I left Mr. Holmes and Mr. Estes. Mr. Holmes was then an officer of the city of Miles City. I left a man by the name of Estes there. He was appointed an officer that evening.

Recross-examination.

(By Mr. MURPHY.)

Mr. Farr asked Mr. Willis to open the cupboard. I did not hear Mr. Willis at that time tell him that he did not have a key to that cupboard; that it belonged to a man by the name of Kimball, who had built it in there. He refused to open it. He did not say he didn't have the key; just said he wouldn't open it.

Witness excused. [26]

**Testimony of George W. Farr, for the Government.**

GEORGE W. FARR, a witness produced on behalf of the Government in the foregoing entitled cause, having been first duly sworn, was examined in chief by Mr. Slattery, and testified as follows, to wit:

Direct Examination.

(By Mr. SLATTERY.)

My name is George W. Farr; my business is attorney at law, and I have practised as such in the state of Montana about twenty-five years. I have lived at Miles City, Montana, the same length of time. In the month of March of this year, and particularly on the nineteenth of that month, I was an officer, and held the office of City Attorney of Miles City.

I am acquainted with the defendant, J. W. Willis, and I have known him about fifteen or twenty years. I know of the green house or building that he lives in at five hundred eleven Pacific Avenue, in the city of Miles City. I was in that house on the nineteenth of March, of this year. I went there about eleven-thirty; I went with Mr. Procknow, Mr. Holmes, Mayor Wilkinson and Mr. Estes to the rear door of the house. The defendant was there on that occasion. There was a woman in the house with him. I know the woman by sight, but I can't recall her name; I know her by reputation. The defendant appeared to have been drinking when I entered the house. I found in the house a large number of empty bottles—there were some not entirely empty—

(Testimony of George W. Farr.)

that is to say, there were a few drops or a spoonful in the bottom—and some empty jugs; I don't remember how many. I didn't count either the bottles or the jugs. I should judge there were forty or fifty bottles, all told; possibly more, and a half dozen to a dozen jugs. I noticed some of the labels on the empty bottles; some of them [27] had whiskey labels,—Green River, I recall that. There was some Scotch; yes, there were some Green River labels. I recall a cupboard in the rear room or kitchen of this place. We asked Mr. Willis to open the cupboard; it was locked. When we asked him to open it, I don't just recall what he said; in any event, he refused to open it. It was opened in his presence there. I think there were one or two bottles found in it; I can't say about the bottles, but there were several jugs, one of which was a glass jug, as I recall it. We were operating under a search-warrant; Mr. Procknow had the search-warrant. I don't remember whether that search-warrant was prepared in my office or not. Some of them were prepared in my office and some in the county attorney's office. After searching in the kitchen, I did or observed a little searching in the front room; I recall picking up a bottle off the floor that was about half full of liquor, and setting it on the table.

Mr. SLATTERY.—Q. I will hand you this bottle (handing article to the witness); can you identify that as the one which you picked up? I don't think that was the one, but it was about that full or a little more. It runs in my mind—



(Testimony of George W. Farr.)

The WITNESS.—(Continuing.) I don't recall whether there was a label on the one that I picked up. I recall when Mr. Procknow left the place; he had arrested both the defendant and this woman, but he turned them over, I believe to Mayor Wilkinson to take up to the police station. I did not make or watch a thorough search of the place; Mr. Holmes and Mr. Estes were left to continue the search.

Cross-examination.

(By Mr. MURPHY.)

The WITNESS.—I opened the cupboard in the kitchen; there were some jugs that were not in the cupboard. I don't recall, Mr. Murphy, how many jugs were in the cupboard, but there were [28] several; I didn't count them. Mr. Willis mentioned Frank Kimball's name in connection with the cupboard when I asked him to open it, but I don't think he said he didn't know anything about the cupboard. I don't remember his telling me that Frank Kimball built that cupboard during Mr. Willis' absence in California, but I think he mentioned Frank Kimball's name. He refused to open the cupboard; I don't recall of his giving any reason; as I recall it, he absolutely refused to open the cupboard without giving any reason. He did mention Frank Kimball's name, but I don't remember in what connection. I don't think that is the bottle I picked up off the floor (indicating bottle in counsel's hand).

Redirect Examination.

(By Mr. SLATTERY.)

The WITNESS.—I smelled of some of the jugs



(Testimony of George W. Farr.)

and some of these numerous bottles in the house on that occasion, and from the odor, I would say they contained some of that whiskey, or some of that moonshine, even at that time.

Recross-examination.

(By Mr. MURPHY.)

The WITNESS.—Those were both jugs and bottles, and from the smell, I would say that they had contained whiskey, and some of them had a very small quantity left,—that is, a few drops or a spoonful.

Mr. MURPHY.—Q. You couldn't tell, from smelling of those jugs, how long before it had been since there had been any liquor in them?

A. Not the jugs, but I think I could the bottles. I couldn't tell as to how long before they had been full.

The WITNESS.—(Continuing.) I could say that I could tell, by the jugs, as to what had been in them; some of them had had whiskey in them and some of them moonshine. I said I could not [29] tell by the jugs as to how long they had been in there, or how long before they had had whiskey in them.

Witness excused.

### **Testimony of Walter Holmes, for the Government.**

WALTER HOLMES, produced as a witness on behalf of the Government in the foregoing entitled cause, having been first duly sworn, was examined in chief by Mr. Slattery, and testified as follows, to wit:

;(Testimony of Walter Holmes.)

Direct Examination.

(By Mr. SLATTERY.)

The WITNESS.—My name is Walter Holmes. I live at Miles City, and have lived there about two years. In the month of March of this year I was an officer of the city of Miles City, holding the office of traffic patrolman. I still hold the same official position in that city.

I know the defendant, J. W. Willis. I have known him personally since the raid; that is, the night of the nineteenth of March of this year. That occurred about eleven-thirty o'clock at night. That occurred at the place where he was living, at five hundred eleven Pacific Avenue, Miles City. I was with Mr. Procknow, Mr. Farr, Mr. Wilkinson and Mr. Estes to his house on that occasion. I went to the front door and entered the house. I saw the defendant in there, and there was a woman with him. I did not know the woman at that time. I had heard of her and knew of her by her reputation. I made a search of that house for the purpose of finding whiskey or liquor or bottles or jugs or containers for the same. I recall the occasion of Mr. Farr and Mr. Procknow leaving the house; they left before I did; I made the search after they left. Up until the time they left, I had observed empty bottles in those rooms; there must have been about forty or fifty bottles. [30]

Mr. SLATTERY.—Q. Did you notice any labels on them? A. Yes, sir.

Q. What were some of the labels on the bottles—

l(Testimony of Walter Holmes.)

Mr. MURPHY.—We object to the question, if your Honor please, on the ground that the label would be the best evidence.

The COURT.—It is a sort of fugitive matter which may, however, be of some value, or perhaps it would not have been asked. Objection overruled; he may answer.

Mr. MURPHY.—Note an exception.

The WITNESS.—A. They were Green River bottles.

Mr. SLATTERY.—Q. Green River what?

A. Green River whiskey.

The WITNESS.—(Continuing.) In this search that I made, I found some bottles containing whiskey in that house; I found them in the bottom of the trunk; it was unlocked. I found a bottle of whiskey on a shelf in the front room; that bottle was nearly half full.

Mr. SLATTERY.—Q. I will hand you this bottle (handing bottle to the witness) and ask you to state if you can identify that? A. Yes, sir.

The WITNESS.—(Continuing.) I have seen it before; I first saw it at Willis', at the defendant Willis'. That is the bottle that I found on the little shelf in the front room (indicating).

Mr. SLATTERY.—We offer it in evidence. Do you want to see it?

Mr. MURPHY.—You offer the bottle and contents, both?

Mr. SLATTERY.—Both the bottle and contents.

(Testimony of Walter Holmes.)

Mr. MURPHY.—We object to it as not showing what the contents are.

The COURT.—You will show it, eventually, I assume.

Mr. SLATTERY.—Yes, your Honor; we will offer evidence to prove the contents, of course. [31]

The COURT.—Very well. Objection overruled, on the promise of counsel to make a sufficient showing.

The WITNESS.—(Continuing.) I picked that bottle up after I had found the other bottles. I found six other full quarts of Green River Whiskey; that was in the trunk.

Mr. SLATTERY.—I will now hand you two bottles (handing bottles to the witness), and I will ask you to state if you recognize those bottles?

A. I do; yes, sir.

The WITNESS.—(Continuing.) I first found those bottles in the trunk I have already described as being in Mr. Willis' front room. Those are absolutely two of the bottles which I took out of his trunk at that time. I have not tasted them or the contents of them myself.

Mr. SLATTERY.—I will offer them in evidence, on the promise to prove the contents of the same by another witness, if the Court please.

The COURT.—Were these sealed? Did they have the Government tax stamps on them?

Mr. SLATTERY.—Yes; they have the Government tax stamps on them.

The COURT.—It will be sufficient as it is to go to

(Testimony of Walter Holmes.)

the jury; but you have the privilege to prove the contents further, if you desire it.

Mr. MURPHY.—I'll take your word for it.

The COURT.—It will be for the jury to consider in the nature of any other evidence submitted in the case; I don't mean, of course, that the bottles are to go to the jury-room.

Mr. SLATTERY.—I beg the Court's pardon; I didn't quite understand?

The COURT.—I said they could go to the jury, they can consider it as evidence. I don't mean to send the bottles to the jury-room.

The WITNESS.—(Continuing.) There were some glasses there, but I couldn't exactly say there were whiskey glasses, because [32] I didn't pay any particular attention to them. I did not pick up any of the empty bottles or take them away. I did not search the kitchen; just the front room, where I found the six quart bottles of Green River whiskey. The other four bottles were like this (indicating).

### Cross-examination.

(By Mr. MURPHY.)

The WITNESS.—My search was confined to the front room of that house. It was just a small room; I don't remember how many chairs there were in that room. I couldn't say whether there was a small table, with a telephone on it. I didn't pay much attention to the contents of the room. I did not say I found those two bottles, exhibits "B" and "C," in the bottom of the trunk and six others, I found them with four others. This one (indicated by counsel).



(Testimony of Walter Holmes.)

was on the shelf. Those are the only bottles I took any particular interest in. I just walked in the kitchen and picked up a few empty bottles and put them down again. I didn't notice whether this woman went out with Procknow.

Witness excused.

**Testimony of George H. Estes, for the Government.**

GEORGE H. ESTES, produced as a witness on behalf of the Government in the foregoing entitled cause, having been first duly sworn, was examined in chief by Mr. Slattery, and testified as follows, to wit:

**Direct Examination.**

(By Mr. SLATTERY.)

The WITNESS.—I live at Miles City; I have lived there a little better than three years, since June, 1910. I am an officer of the Industrial School. I teach the high grade there. [33] In the month of March, of this year, on the nineteenth of March, I went to the house at five hundred eleven Pacific Avenue, in the city of Miles City. I had one meeting with the defendant Willis prior to that night. I knew that night who he was. I couldn't say that that was his place that I went to on that night, for I don't know. He was in there when I got there, and there was a lady present; I had not known her before. I went to that house that night at eleven thirty or thereabouts. I saw Mr. Farr and Mr. Procknow in there. I was there when Mr. Holmes was searching the front room. I saw Mr. Holmes

(Testimony of George H. Estes.)

get something out of a trunk in that room. He took some bottles, labeled Green River whiskey out of it.

Mr. SLATTERY.—Q. I will show you exhibits “B” and “C,” and ask you to state if those are two of the bottles that he took out of there on that occasion?

A. Those are two bottles just like those that came out of that trunk.

The WITNESS.—(Continuing.) I noticed on that occasion that Mr. Holmes picked up another bottle, not full, on a little shelf in the front room.

Mr. SLATTERY.—Q. I will hand you Plaintiff’s Exhibit “A” (handing bottle to the witness) and ask you to state if you can identify that as the bottle which he picked up there at that time?

A. I didn’t put any label on the bottle, but this bottle (indicating) appears to be the same bottle.

The WITNESS.—(Continuing.) It had a Green River whiskey label on it. I am not sure whether I helped carry those bottles out or not; I couldn’t say. I noticed Mr. Procknow and Mr. Farr pick up quite a few empty bottles or jugs; there were quite a few; I couldn’t say just the names that were on them, except that I remember there were some of them with the Green River whiskey label on them. The label was similar to those on the exhibits before me. I didn’t smell of any of the empty bottles [34] in the room there, or of any of the jugs.

Cross-examination.

(By Mr. MURPHY.)

Q. Mr. Estes, these bottles merely look like some

(Testimony of George H. Estes.)

that you saw there at the house at that time?

A. Yes, sir; those bottles appear to be the same bottles that were there. I didn't put my label on them, as I say.

Q. There are no marks upon them by which you could identify them as the ones that were taken out of that house, are there?

A. As I stated a while ago, I did not put any label on them, but I saw Green River bottles taken out of the trunk.

Q. You don't know who took them away from the house, if they were taken away?

A. Well, either Mr. Holmes or myself took them over to the automobile in which they were carried to the police station—I disremember who did. Probably both of us carried some of them.

Witness excused.

### **Testimony of O. M. Wilkinson, for the Government.**

O. M. WILKINSON, a witness produced on behalf of the Government in the foregoing entitled cause, having been first duly sworn, was examined in chief by Mr. Slattery, and testified as follows, to wit:

#### **Direct Examination.**

(By Mr. SLATTERY.)

The WITNESS.—My name is O. M. Wilkinson. I live at Miles City, Montana; I have lived there since 1914, in the spring. In the month of March of this year, my business, officially, was Mayor of the city; Mayor of Miles City.

(Testimony of O. M. Wilkinson.)

I know the defendant, Willis. I have known him since I moved to Miles City, about seven years. I have lived there a little over seven years. On the night of the nineteenth of March of this year, I was at a house or building known as number five hundred eleven Pacific Avenue, in the city of [35] Miles City. I went there about eleven-thirty, and I left there twice; I suppose it was about twelve o'clock, the first trip.

Mr. SLATTERY.—Q. And on either trip that you left, did you take away with you any bottles that had been turned over to you by anybody in that house?

A. Yes, sir.

Q. Who turned the bottles over to you?

A. Mr. Holmes was there at the time.

The WITNESS.—(Continuing.) That is the same Mr. Holmes who has testified here as a witness. He turned them over to me at the house. The bottles were in my care, and I drove to the City Hall and took them in there. I delivered them to the Chief of Police, Martin Golden. The bottles were marked in my presence.

Mr. SLATTERY.—Q. I will hand you Plaintiff's Exhibit "A" (handing bottle to the witness), and I will ask you to state if that is one of the bottles that you received from Mr. Holmes at that house on that occasion? A. I will say it was.

Q. Do you notice any marks on it?

A. There is two file marks that I put on the stamp.

Q. I will hand you Exhibits "B" and "C," and I will ask you to state if you received those two bot-

(Testimony of O. M. Wilkinson.)

bles (handing bottles to the witness) from Mr. Holmes on that occasion at the home of the defendant? A. Yes; I did.

The WITNESS.—(Continuing.) There is no question but what those are the two bottles that I received. I say I turned them over to Mr. Golden. In addition to those, I received other bottles from that house from Mr. Holmes on that occasion; I had quite a number of empty bottles; I wouldn't have any idea as to how many there were; two or three or four dozen. I don't know as I had that many; I didn't count them. Some jugs; one glass demijohn that might hold about five gallons, I guess, and [36] some jugs made of ordinary pottery. I received some other full bottles from Mr. Holmes there; there were four or five besides these indicating).

#### Cross-examination.

(By Mr. MURPHY.)

The WITNESS.—I witnessed a mark put on these bottles, Exhibits "A," "B" and "C"; I witnessed the marks that are on there. There are two file-marks on there on the neck of the bottle. Those are the only marks that I saw put on them. I got four or five other full bottles from there besides these. I was there when Mr. Farr and the others first went there.

Witness excused.



**Testimony of Martin Golden, for the Government.**

MARTIN GOLDEN, produced as a witness on behalf of the Government in the foregoing entitled cause, having been first duly sworn, was examined in chief by Mr. Slattery, and testified as follows, to wit:

**Direct Examination.**

(By Mr. SLATTERY.)

The WITNESS.—My full name is Martin Golden. I live at Miles City, Montana. I have lived there thirty-eight years, since 1883. I hold the position of Chief of Police in that city, and have held it since 1916. I know the defendant, Willis. I have known him about twenty-five or thirty years, ever since I came to the country. I know Mr. Wilkinson, the witness who has just testified. I recall the night of the nineteenth of March of this year, when he came to the police station. I was not there when he came in; I came in afterwards. I took or received from him some bottles with Green River whiskey labels on them. I marked those bottles at that time in his presence and in the presence of Mr. Holmes, who has already testified in this case. [37]

Mr. SLATTERY.—Q. I will hand you Plaintiff's Exhibit "A," and ask you to state if that is one of the bottles that you received from Mr. Wilkinson at that time (handing bottle to the witness).

A. Yes, sir.

Q. You placed that mark there yourself, did you?

A. Yes, sir; the letters "M" "G," and also the file-marks on the neck.

(Testimony of Martin Golden.)

Q. I will ask you to state whether or not Plaintiff's Exhibits "B" and "C" were also received by you on that occasion from Mr. Wilkinson, and marked by you in his presence and that of Mr. Holmes, who has identified them? A. Yes, sir.

Cross-examination.

(By Mr. MURPHY.)

The WITNESS.—Those are not the only three bottles that I received; I had six full bottles, besides the one partly full there. I marked the six bottles. I have the other four bottles.

Mr. MURPHY.—Q. And the only thing that you know about those bottles is that you put the initials "M" "G" and the file-marks on them?

A. After they were turned over to me.

Witness excused.

**Testimony of H. M. Dengler, for the Government.**

H. M. DENGLER, a witness produced on behalf of the Government in the foregoing entitled cause, having been first duly sworn, was examined in chief by Mr. Slattery, and testified as follows:

Direct Examination.

(By Mr. SLATTERY.)

The WITNESS.—My name is H. M. Dengler. I hold the official position of Internal Revenue and Federal Prohibition Agent; I was such during the month of March of this year, and ever since that time I have been such officer. I have had experience in [38] gaging whiskey to determine the alcoholic content, or proof of it, rather.

(Testimony of H. M. Dengler.)

Mr. SLATTERY.—Q. I will hand you Plaintiff's Exhibit "A," and I will ask you to state if you ever tested that, either physically or otherwise, for the purpose of determining whether or not it contained alcohol.

A. I examined this and found it to be whiskey. I didn't get the proof, because I wasn't—

Q. But you say it was whiskey?

A. That (indicating) is whiskey; it wasn't necessary to get the proof; the seal shows it.

Q. Plaintiff's Exhibit "A." Again handing you Plaintiff's Exhibit "A" (handing bottle to the witness), I will ask you to state whether or not you can tell, from anything appearing upon the bottle—

A. When I opened this bottle, I naturally had to break the Government stamp over the cork of the bottle here (indicating), which shows that it is one hundred proof, bottled in bond, whiskey.

Q. What does one hundred proof mean?

A. That is a designation to show that it is up to proof, that it is fifty per cent pure alcohol; one hundred proof is fifty per cent alcohol; the remaining ingredients are coloring matter, distilled water and whatever else they put into it.

Q. So that fifty per cent of the contents of that bottle is pure grain alcohol?

A. Fifty per cent by volume.

Q. I will ask you to state whether or not that bottle was received by you in the same condition—

A. This bottle—I received this bottle just as it is, except that the seal had not yet been broken, and

(Testimony of H. M. Dengler.)

there on the seal I would say that it was the same as the others (indicating) at the time I received it.

Q. Is that the United States Government seal on that bottle?

A. That is the Government stamp, bottled in bond.

Q. That implies that it is whiskey, does it not?

A. Yes, sir. [39]

Cross-examination.

(By Mr. MURPHY.)

Q. In arriving at your opinion of Exhibit "A," is it just from the smell or the taste of it?

A. I smelled it and I tasted it.

Q. Both? A. Both.

Witness excused.

### **Testimony of C. S. Hannah, for the Government.**

C. S. HANNAH, a witness produced on behalf of the Government in the foregoing entitled cause, having been first duly sworn, was examined in chief by Mr. Slattery, and testified as follows, to wit:

Direct Examination.

(By Mr. SLATTERY.)

The WITNESS.—My name is C. S. Hannah. I live at Simms, Montana, in Cascade County. I am farming over there. In the month of March, of this year, I was in Miles City, Montana. I am acquainted with the defendant, J. W. Willis; that is the gentleman sitting down on the end of the table there (indicating). I first became acquainted with him on the sixteenth of March, of this year.

(Testimony of C. S. Hannah.)

I became acquainted with him at five hundred eleven Pacific Avenue; that is a small green building. Mr. Gordon was with me when I became acquainted with him. Mr. Gordon did not introduce me to him. Mr. Gordon walked into the house with me. After I got in there, Mr. Willis was there and Mr. Henderson was there. On that occasion and in that house, I drank some whiskey. The whiskey came from a bottle that Mr. Willis poured into a whiskey glass. The bottle was setting on a little stand in the corner of the room. Before Mr. Willis poured out this whiskey, Mr. Gordon ordered the drink; it was then that Mr. Willis poured it into a small whiskey glass.

Mr. SLATTERY.—Q. How many drinks did he pour out on that occasion.

A. There were three of us, and he bought drinks for [40] each of us. He poured them in succession out of one little whiskey glass. We drank out of the same glass. I drank mine and he poured the drinks around.

The WITNESS.—(Continuing.) He charged me fifty cents a drink. I bought the third round. The other persons who purchased rounds paid him; I don't know the exact change they got. He accepted the money from them. I should judge at the same rate of fifty cents a drink; that was the acknowledged price. I remained in the house on that occasion while I bought the drink; he poured the first drink, and there was an interval of fifteen or twenty minutes elapsed perhaps, and the same



(Testimony of C. S. Hannah.)

amount for the other drinks; perhaps a longer or shorter time. While I was drinking, I don't recall anybody that I know of coming to the house on that occasion. After the defendant furnished me with the drink, he set it back on the shelf; the bottle that he furnished this whiskey from was a—had a Green River whiskey label on it. The bottles were quite similar in appearance to Plaintiff's Exhibits "A" "B" and "C." I said it had a Green River whiskey label on it.

Mr. SLATTERY.—Q. Was there any question in your mind that what he furnished you at that time was whiskey?

Mr. MURPHY.—That is objected to, if the Court please, for the reason that it is irrelevant and immaterial as to whether he had any doubt in his mind.

Mr. SLATTERY.—I will withdraw the question.

The WITNESS.—(Continuing.) Prior to that occasion I had tasted whiskey quite often through about ten or fifteen years, I should say, so that on the sixteenth of March of this year I was familiar with the taste of whiskey. It was whiskey that the defendant sold me and the other gentlemen on that occasion. I was there again later on that same day, on the sixteenth of March. Mr. [41] Gordon and Mr. Henderson were with me. On the second occasion, I received some whiskey by purchase from Mr. Willis in that house. Mr. Henderson paid for it; I couldn't say at what rate per drink, but we always paid fifty cents a

(Testimony of C. S. Hannah.)

drink. He got the whiskey from the stand that he furnished us on the second occasion that we were there, from the same place that he got it on the other occasion. It was in a bottle. I don't think the bottle had a label on it; it was white liquor this time that he furnished us. I am quite sure the other bottle had no label on it. We had some conversation on that occasion about the difference in the whiskies between what he furnished us then and what he furnished us the first time. We said this was moonshine, and he said yes, and I remember Mr. Henderson said he liked moonshine, or something to that effect. I think Mr. Willis said that the moonshine was better than Green River. I don't remember exactly what the conversation was we had along the line of being able to drink moonshine and get up in the morning feeling fine and if we drank Green River we would get up with a headache; we were talking about the difference in whiskey.

Mr. SLATTERY.—Q. But there was a discussion as to the difference between the whiskey which he was selling you, was there, on that occasion? That was in the evening, as I understand you, of the sixteenth of March, and did you notice whether or not there was anybody else in the house besides yourself and Mr. Willis?

A. There were some other gentlemen there.

The WITNESS.—(Continuing.) They were in the same room that we were in. I was there again on the seventeenth of March of this year. On that

(Testimony of C. S. Hannah.)

occasion Mr. Gordon, Mr. Henderson, and a man by the name of—we called him Vic Smith—were with me. On the seventeenth of March I went there along later [42] in the evening, between nine and ten o'clock. On that occasion there was some whiskey sold to us by the defendant. I ordered the first round of drinks after we went in; he gave us whiskey. He served us in the kitchen this time. He had a bottle setting right by the stove. That bottle had no label on it. I should judge we were in the kitchen about fifteen or twenty minutes. The defendant told us to sit in the kitchen there a minute; he had something in the other room, and he opened the door and went in the other room while we were in the kitchen. At one time when he went in the other room from the kitchen, he took a receptacle in there with him. I heard a woman's voice in the other room, and I heard men's voices. I couldn't tell whether there was more than one woman in there.

Mr. SLATTERY.—Q. Well, from the sound of the voices in the front room, would you say they were the voices of boisterous people, or otherwise?

Mr. MURPHY.—To which we object as being leading, and asking for the conclusion of the witness. This witness is intelligent and I think he can state what he saw and heard without being asked in that manner.

The COURT.—I think the question is permissible in that form. Objection overruled.

Mr. MURPHY.—Note an exception.

(Testimony of C. S. Hannah.)

The WITNESS.—A. They were somewhat boisterous. (Continuing.) The defendant did not allow any of us who were in the kitchen to go into the other room that evening. The defendant made a statement to us about not going in there; he said he had a bunch in there, and he wouldn't let us go in there then; he told us to stay out. He served us two rounds of drinks in the kitchen on that occasion. It was of [43] the moonshine variety; it was whiskey. That is the last occasion I was there on the seventeenth.

Cross-examination.

(By Mr. MURPHY.)

The WITNESS.—I live at Simms, Montana. That is thirty-three miles from Great Falls. I was to this house on three occasions, two on one day and one on another day. It was shortly after noon when I went to the house first on the sixteenth. I stayed there then, I should judge, about an hour. Mr. Gordon and I went there that time. Besides Willis, Mr. Henderson was there. There was no one else came in at that time that I remember while I was there. I saw no other person in the house at that time. I came back later that day. That was early in the evening, but it was dark; I should judge it was about eight o'clock. Those are the only two times I was there on the sixteenth. On the sixteenth I came to the back door and went through the kitchen into the front room. That is just a small two room house. The second time that evening I came in the back door. I can't remember



(Testimony of C. S. Hannah.)

that we went into the front room. There were some other men in there at that time; I don't know their names; I recognized one of the men since I came here. He is in the courtroom. I don't know whether it was Richard Burnhart; they called him Bones; that's all I know. I couldn't say whether his name is Drinkert. The one they called Bones was there. There were two other men. I don't live in Miles City. When I came back the next day, the seventeenth, it was about ten o'clock in the evening, around that hour. The three of us were there then, Henderson, Hannah and Gordon, and another man by the name of Schaum, I think; he went with us. All four of us stayed in the kitchen at [44] that time. We had two rounds of drinks. I should judge we stayed there about half an hour at that time; maybe twenty minutes. That was about ten o'clock of the evening of the second night; I wouldn't be sure; between nine and ten; something like that.

MR. MURPHY.—Q. Those are the only two occasions you ever went to this place?

A. On those two days.

Q. You don't know how many people were in the front room the night you were there the second time?

A. I went to the place another occasion, but there was no one at home.

Q. Do you know how many people were in that front room that you spoke of that night you were in the kitchen? A. Which night was it?



(Testimony of C. S. Hannah.)

Q. The second night.

A. No; I don't know who was in the front room.

The WITNESS.—(Continuing.) I heard some voices there. I should judge there was more than one person. It sounded like there was different men's voices, and there was just one woman's voice that I heard. I couldn't hear the conversation they were carrying on, but I am quite certain there was another man's voice besides Mr. Willis; that would make Willis and two others. I couldn't say whether that was all; I didn't see in the other room; I don't know. I was in the employ of the county attorney at that time, Mr. R. B. Hayes; the county attorney of Custer County. I couldn't say whether Henderson and Gordon were likewise in his pay; I don't know.

Mr. MURPHY.—Q. The three of you were making it a business, were you not, going around trying to find bootleggers?

A. We were getting evidence of bootlegging; yes, sir.

Q. And you spent several days doing that?

A. Yes, sir.

Q. And you were drinking freely at all different places, wherever you could get it? [45]

Mr. SLATTERY.—That is objected to, if your Honor please, as immaterial, whether they were drinking freely. The witness has testified that they paid for it.

The COURT.—He has shown the nature of his employment, and the incidents in connection with

(Testimony of C. S. Hannah.)

his drinking at this particular place. It is sufficient to show anything connected with this place; beyond that, I do not believe it is proper to go, and I do not believe the question is one that should be pressed. His occupation was an honorable one and entitled to as much respect as any other. The Court sustains the objection.

Mr. MURPHY.—Note an exception.

The COURT.—It may be noted.

Redirect Examination.

(By Mr. SLATTERY.)

The WITNESS.—(Continuing.) Defendant's counsel brought out that I saw there on the night of the sixteenth a man who is now in the courtroom. I said he was called Bones. He is the gentleman sitting in the front row (indicating), on the corner here(indicating). There were some other men there besides Mr. Willis and we three. They were talking about some cases that had been tried in the court at Miles City, some bootlegging cases.

Mr. SLATTERY.—Q. What did this man Bones say to Willis about those cases?

Mr. MURPHY.—If the Court please, we object to that as being immaterial, and having no possible bearing on the issues here presented.

The COURT.—Unless it would serve the purpose of showing a violation by this defendant or some phase of this case, it wouldn't be material at this time that I can see. There may, perhaps be a later time when it might be shown with more propriety. The objection will be sustained.

Witness excused. [46]

**Testimony of T. R. Gordon, for the Government.**

T. R. GORDON, a witness produced on behalf of the Government in the above-entitled cause, having been first duly sworn, was examined in chief by Mr. Slattery, and testified as follows, to wit:

**Direct Examination.**

(By Mr. SLATTERY.)

The WITNESS.—My name is T. R. Gordon. I live in Rosebud County, Montana. I have lived in Montana since 1916. My general occupation has been homesteading and contracting, road work. In the month of March of this year I was employed by the county attorney of Custer County for the purpose of seeking out violators of the prohibition law. In the month of March of this year, I became acquainted with the defendant, Willis. I became acquainted with him first on the tenth day of March of this year. That was at five hundred eleven Pacific Avenue, in the city of Miles City. Mr. Henderson introduced me to him. On that occasion I went to the house, to the back door. On that occasion I remained in there something like thirty minutes. I had something to drink in there; it was bought. Henderson bought one and I bought one round of drinks. I bought whiskey from Willis, the defendant. I paid fifty cents a drink for what I bought. He gave us the whiskey out of a quart bottle. It had a label on it. The bottle was on a little shelf in the front room. When he delivered it to us, he poured the whiskey into a small whiskey

(Testimony of T. R. Gordon.)

glass. He displayed one whiskey glass at that time. He did not entrust either of us with the bottle. I purchased whiskey again from the defendant in that building on the eleventh; that was the following day. There was no more than one round purchased on the eleventh of March; Mr. Henderson paid for that. It was whiskey that was purchased. [47] It was gotten from the same place. The bottle was labeled Green River whiskey. After the eleventh of March, I was there again on the twelfth. On the twelfth of March, I bought whiskey from the defendant in that house and drank it there. I paid him for it. He got it out of the same bottle, apparently. He got it from the same place in the same room. I was not there more than once on the twelfth of March. I bought some more whiskey from him after the twelfth of March in the same room, on the fourteenth. Mr. Henderson was with me. I paid him for the whiskey. He charged me fifty cents a drink for this whiskey. After the fourteenth of March, I purchased some on the sixteenth; on the sixteenth and seventeenth also. With respect to the fourteenth, sixteenth and seventeenth of March that I bought whiskey there in that house, we were served with whiskey out of a bottle with a Green River label on it, a Green River label, and also with white whiskey. It was called moonshine. Mr. Willis called it moonshine. I remember when he first served me with moonshine whiskey; it was the afternoon of the sixteenth. Mr. Hannah was present on that occasion. Mr. Willis said he would



(Testimony of T. R. Gordon.)

much rather drink moonshine whiskey than Green River whiskey. There was no difference in the price that he charged me for moonshine as against the other; the same price. I recall the occasion of drinking whiskey in the kitchen. That was on the seventeenth. I recall on that occasion hearing someone in the front room of the house. I did not dare to go in the front room on that occasion. Mr. Willis just came up and closed the door and said he had company in the front room. I heard a lady's voice and a man's voice in the front room, but I couldn't quite understand the conversation. The defendant did not allow me to go into the front room on that [48] occasion. He took the slop jar into the front room. What whiskey I got from him on that occasion, I got from him in the kitchen, and paid the same price for it. I saw in that house on the night of the sixteenth of March a man called Bones. He is in the courtroom now.

Mr. SLATTERY.—Q. You overheard a conversation, did you, between him and Mr. Willis—a conversation between Mr. Willis and Mr. Bones?

A. Yes; they were talking about a case—

Q. I am not asking you what it was, Mr. Gordon, now—

The COURT.—If it is anything incriminating, you have a right to bring it forward at this time. It may properly be part of your case in chief, and the Court previously denied it for the reason that you were going into it on redirect. The ruling at that time was that it was improper redirect examination.



(Testimony of T. R. Gordon.)

Mr. SLATTERY.—I can just as well save it for impeachment, if your Honor please.

The COURT.—Very well; proceed.

The WITNESS.—(Continuing.) On one of those days that I was in there buying whiskey from the defendant, I saw a colored woman in there by the name of Lizzie Drake; that was on the fourteenth, just a little before noon. She came into the house after I was in there. She came in the back door. We were sitting in the front room. She came into the front room. She sat down in Mr. Willis' home there. She was served with whiskey on that day in Mr. Willis' home. Mr. Henderson bought a round of drinks and Mr. Willis served her with it; that is the defendant in this case.

Mr. SLATTERY.—Q. Was that out of the same bottle that you drank from?

A. Before that; yes, sir.

The WITNESS.—(Continuing.) Miss or Mrs. Drake, whatever her [49] name is, remained in there on that occasion, I would say about thirty minutes. There was not more than one drink furnished to her by Mr. Willis on that occasion that I remember. On the night that this man known as Bones and other people were there, drinks were served to Bones and the other people. There were three other people in the Bones party, if I remember right. There were two rounds of drinks served at that particular time to Bones and his party. I saw someone pay Mr. Willis money for the drinks that

(Testimony of T. R. Gordon.)

were served to Bones and his party. Mr. Henderson paid for one round of drinks and the other party paid for one. I couldn't say what Mr. Willis charged them for drinks, but he always charged me fifty cents a drink. I saw the money change hands.

Cross-examination.

(By Mr. MURPHY.)

The WITNESS.—When this colored lady came in there, I don't remember whether she had a bucket of eggs with her or not.

Mr. MURPHY.—Q. Didn't she come in there and want to borrow some money from Mr. Willis to buy horses with?

Mr. SLATTERY.—That is objected to, if your Honor please, as immaterial and not proper cross-examination.

The COURT.—Under the circumstances of what happened there, it might be material on cross-examination; this is cross-examination. You may answer. Objection overruled.

The WITNESS.—A. No, sir; there wasn't anything said that I heard. (Continuing.) I don't remember a word of her wanting to know something about money for horses that she was going to buy at Fort Keogh. She didn't have any eggs she wanted to sell. I don't remember seeing any eggs.

Mr. MURPHY.—Q. Didn't you and Henderson go out of the Willis house and go down an alley to the house that she was [50] living in, and didn't she cross the street and go around by the street to

(Testimony of T. R. Gordon.)

her house and she let you come up and cook some eggs there, and give you a meal there?

Mr. SLATTERY.—That is objected to as improper cross-examination and immaterial for any purpose in this case.

The COURT.—This is cross-examination. I think it is proper. He may answer. Objection overruled.

The WITNESS.—A. Yes, sir.

Mr. MURPHY.—Q. And later, on other occasions you went back and got eggs there and ate at her house, didn't you?

A. Yes, sir; I had two meals at her house.

The WITNESS.—(Continuing.) I paid her for them.

Mr. MURPHY.—Q. She only said that she had a bucket of eggs she just brought from the house and wanted to sell them to him and Willis said that he had bought eggs, or got eggs from the ranch and didn't need them?

Mr. SLATTERY.—Objected to as immaterial. I can't see the purpose, if your Honor please, of this conversation about eggs.

The COURT.—Oh, perhaps it isn't very material, but he may answer; overruled.

The WITNESS.—A. No, sir; I didn't hear any conversation between her and Mr. Willis in regard to eggs.

The WITNESS.—(Continuing.) That was only a small house. I was in the front room when she came

(Testimony of T. R. Gordon.)

in. She came in the back room. She came right on into the front room. She was alone. Henderson and Willis and I were alone. I first went on the tenth to Willis' house, and the next was the eleventh, twelfth, fourteenth, sixteenth and seventeenth. The seventeenth was the last time I was there. I wasn't there during the raid. These times I went down there I went as an employee of the [51] county attorney to secure evidence against Willis.

Mr. MURPHY.—Q. Handing you paper marked Defendant's Exhibit One, I will ask you if that is your signature (handing paper to witness.)

A. Yes, sir.

Q. Just take a look at it so as to be sure?

A. I think that is my signature; yes sir.

Q. That was signed by you before a person who signs his name as James W. Austin, Deputy Collector, was it not?

A. Yes, sir.

Q. Mr. Austin is a Deputy Collector of Internal Revenue for the District of Montana, is he not?

A. Yes, sir.

Mr. MURPHY.—We offer, as part of the cross-examination of this witness, defendant's proposed Exhibit One.

Whereupon a recess was had in the trial of said cause for the period of five minutes.

Court convened pursuant to recess.

Present.—Same as before.

The COURT.—Proceed.

(Testimony of T. R. Gordon.)

Mr. SLATTERY.—We object, if the Court please, to the introduction of the proposed Exhibit on the ground that it is immaterial and no foundation has been laid, and that it has no probative value.

The COURT.—Objection sustained.

Mr. MURPHY.—Note our exception.

The WITNESS.—(Continuing.) I saw this man I called Bones there in the house on the evening of the sixteenth; it was along, I should judge, about nine o'clock, at night.

Mr. MURPHY.—There was a prosecution of this defendant on this charge in the State Court in the month of April, 1921, in Custer County, was there not?

Mr. SLATTERY.—If your Honor please, that is objected to as [52] incompetent, irrelevant and immaterial and improper cross-examination.

The COURT.—Well, I must assume, under the circumstances, that this is cross-examination. Of course, counsel is not obliged to disclose his purpose. Objection overruled; you may answer.

The WITNESS.—A. It was something about that time, I think; yes, sir.

Mr. MURPHY.—Q. In the month of April?

A. Yes, sir.

Q. Was the prosecution of this defendant, Willis, for this same charge on which he is being tried here?

The COURT.—No, no; that is impossible.

Mr. MURPHY.—May I have leave to finish the question, your honor?

The COURT.—Pardon me; I thought you had



(Testimony of T. R. Gordon.)

finished. Go ahead with your question.

Mr. MURPHY.—Q. On a charge in the state court for the same offense for which he is being tried here?

A. Yes.

Mr. SLATTERY.—I object to that on the ground that it is improper cross-examination—

The COURT.—I had assumed that you were pursuing a legitimate course, Mr. Murphy. Of course, the defendant could not be tried upon the same charge. The witness has already answered, however. Proceed.

Mr. MURPHY.—Q. Did you testify in that proceeding as a witness? A. Yes, sir.

Q. Didn't you testify in that proceeding in the month of April, in Custer County—1921, that you did not know that it was moonshine or whiskey that you got? A. Not that I remember of.

#### Redirect Examination.

(By Mr. SLATTERY.)

The WITNESS.—As a matter of fact, I got both kinds of [53] whiskey at his place, during the times that I have testified to.

Mr. SLATTERY.—The Government rests.

The COURT.—Proceed with the defense.

Whereupon counsel for the defendant stated the evidence which the defendant intended to adduce upon the trial of this cause.

**Testimony of J. W. Willis, in His Own Behalf.**

J. W. WILLIS, the defendant herein, produced as a witness in his own behalf, having been first duly sworn, was examined in chief by Mr. Murphy, and testified as follows, to wit:

**Direct Examination.**

(By Mr. MURPHY.)

The WITNESS.—My name is J. W. Willis. I live in Miles City. The thirtieth of this month, it will be thirty-one years I have lived in Miles City. I came up from Texas with a bunch of trailers and I worked on the range all the time and on the ranch until fourteen years ago. Fourteen years ago I went into the hotel and saloon business. The name of my hotel in Miles City was the Miles City Hotel. It was located right across from the N. P. depot, on Pacific Avenue and Sixth street. On the plot of ground that the hotel was on, I had a barn and two or three coalsheds, and a little cottage that I lived in. That was just one small cottage with two rooms in it. The front room was twelve by sixteen, and the back room was about just the same width but it wasn't quite as wide. During the fall of 1920 I went to California; I left there the sixteenth day of November. When I went away I rented the hotel and cottage out to a man by the name of Kimball, Frank Kimball, the cottage and the hotel. I came back from California the [54] sixteenth day of February, 1921. Kimball was living in the cottage at that time. The hotel was burned down while I was in California.

(Testimony of J. W. Willis.)

Mr. MURPHY.—Q. You returned for what purpose?

A. Well, to collect the insurance and to clean up what I had there.

Mr. SLATTERY.—I object to all of this as immaterial, if the Court please.

The COURT.—It seems to me it is clearly immaterial, but I don't see that it matters. Shorten it as much as possible.

Mr. MURPHY.—I just want to show the purpose of his return.

The WITNESS.—(Continuing.) When I came back, Frank Kimball moved out and I lived in the cottage. My furniture was in that cottage. During the month of March, from the time I came back, I was busy taking down the house; I had contractors and builders take the house down, and I was busy with them—seeing that they took it down and moving out the stuff that wasn't burned. I had three or four in my employ there, I reckon; Dick Burnhart was one, and James is one and Bones is the other. I don't know his other name; I worked with him on the range so long, and we always knew him by Bones. His real name is Drinkert. There was another one there, but he left the country; I don't recall his name. On the 10th of March, 1921, I was engaged in the work of wrecking that hotel building. I had to wait until they got a lot of the litter off, so I could get the bar and stuff out, but the tenth of March, I got these men to remove the bar fixtures and stuff out. I just barely know the witnesses

(Testimony of J. W. Willis.)

Gordon and Hannah, who testified here in this case, if I see them is all. I recognized them after they come here, but I wouldn't know them now by name. I remember Gordon coming to my house about the tenth of March, 1921. There was Gordon and Bert [55] Henderson were the first two that came in. When the first came to my house on the tenth of March, they was all around there working; I don't know just whether there was right at that time or not. I think they come in the morning about ten o'clock the first time; they didn't stay over ten minutes. They came in and wanted a drink, and I told them I didn't have any. They said, "Well, we've got some to sell," and they pulled a bottle out of their pocket and passed it around. I took a drink out of it myself. It was what I call moonshine. I told them it was pretty good. I had to brag on it, because they gave it to me. They wanted to sell me some. Bert said he made as much as fifty gallons in a day; said he had a still out in the country some place. They came back, I believe, that evening; I don't remember, but when they came back, I was busy and I didn't pay much attention to them. It was along two or three o'clock, I guess, some time; I don't remember, in the afternoon. There were some boys there that were working for me. They were in the house. They brought back the same bottle or another one, and we had another drink around, and one of them was telling where there was some women that they could fool around with, and they asked me if I knew, and I says,



(Testimony of J. W. Willis.)

“Well, I don’t know, boys,” I says, “but I am going over to the depot, and you can come and go over there with me, if you want to, and I’ll show you,” I says, “where there ought to be something.” I says, “Just scatter around over here”—they went over with me—and I says, “You may get a high-ball most any time; there’s most always plenty of them around here.” I went home and they came back in about half an hour. I guess they didn’t have much luck. To tell the truth, I don’t remember what time that was, but it was along about eleven or [56] twelve; somewhere along there. So they came back, and they says, “There’s nothing over there”; they didn’t find anything, and then Hannah picks a quarrel, it seems to me like, with these two other fellows, and they was all standing there talking pretty loud, and I says, “Boys, this is no place for trouble, or anything,” I says, “I’m busy; better take a walk,” and they walked out and went away. These boys, Hannah, Henderson, Gordon, Dick Burnhart, and James and Bones, they was all that was there. There were some drinks taken there that time; they had their bottle. Henderson always carried the bottle. The times they came to my place Gordon there wasn’t so awful drunk, but Henderson was always stewed when I would see him any place. Any time he came to my place he was stewed to the gills; he was drunk. They never stayed in my place any length of time; they wouldn’t be there over fifteen or twenty minutes at the outside. It was a quart bottle they had the moonshine in. They



(Testimony of J. W. Willis.)

asked me several times to buy, but I told them I was trying to sell my property and get out of there. I had an option on property in California, and I wanted to get out of there by the Fourth of July, and I wouldn't take chances on getting in trouble, for I expected to leave here. They came back after that; there was three of them came back, the same three. I don't remember, but I think it was the evening of the seventeenth, but it was about four o'clock in the evening when they came back that time. They came in with a bottle, but they didn't ask me to drink that time; they didn't say a thing about it. I don't now much about what occurred there at my house that day. I was sick, and I got out of bed that day, and I was up to Mr. Hayes' office, but I wasn't gone more than about twenty minutes. I was in bed all day long. I was in bed [57] the night of the seventeenth also; I didn't get up all day. I was sick in bed. Vic Smith was with them; he was there all right, and I asked him for a witness to come up here, and he said—

Mr. SLATTERY.—Move to strike out that answer of the witness as not responsive and—

The COURT.—Motion granted.

The WITNESS.—Vic Smith was with them on one of their visits to my house. The three men I testified about came with Vic Smith; that was about four o'clock in the evening. They came in and sat down, and wanted me to take a drink at that time. I says, "No, boys; I can't; I'm sick; I can't drink at all." That was the time I was in bed, on the

(Testimony of J. W. Willis.)

seventeenth. Vic Smith was sitting there drinking *out their* bottle all the time. They didn't stay but a few minutes, anyway. They didn't mention buying any moonshine then. The seventeenth I promised them a dinner the next day, and there was a couple of women came in and cooked this dinner, and I guess there was half a dozen or more for this dinner. I was sick and never got out of bed to eat myself. When Vic Smith came there with these three men, Bones and Burnhart were there. I don't know whether there were any drinks passed to them in my presence I didn't look. I rolled over in bed and I didn't turn over to see what there was. I did not at any time in the month of March ever give or sell any moonshine whiskey or Green River whiskey, or any kind of whiskey, to Gordon, Henderson or Hannah or anyone else, but I had it; I had Green River. I had that in my trunk. I thought there were twelve bottles, but they claim there was only six. I know of a cupboard out there in the kitchen. Frank Kimball built that cupboard there. I don't know when that was built; [58] he built it while I was gone; while I was in California. I never had a key for that cupboard. Kimball had some stuff in there, and he even had the key to my cottage, and after that raid was made, he came in and carried out some stuff that he had there, and I never knew what was in this cupboard; it was locked. The night that Mr. Farr came down there, I told him—he asked me to open this locker, and I says, “I haven't got the key; Frank Kimball's got the key

(Testimony of J. W. Willis.)

to that." He took a bar or a poker and pried the lock off. I didn't know of any moonshine whiskey or anything being in the cupboard until after they had taken it out. This Green River whiskey that I had was a little stock I had when the saloons closed, and I kept it for myself, and when I went to California, I had it in my trunk, and I buried it out in the barn when I went to California, and when I came back, I went and got it and put it back in my trunk. The house was pretty well furnished. There were three rockers and leather chairs and a bed and a washstand and a bureau, and a stand table. In the kitchen, I've got a good cooking outfit, a range and table and dishes to cook with. I did not have any whiskey or beer glasses around the house. I don't know whose jugs those empty jugs were that were found there; they got them, I guess, out of the locker. The bottles that were there were thrown out in the back yard from the old building around there. There was lots of bottles around there; around the barn now there is a carload, nearly. I don't know whether there were any bottles in the house at the time of this raid; there might have been at that. I hadn't been there for so long I didn't pay much attention to what there was, but this liquor, I never had anything to do with that; never had a key for it at all. I guess the stuff they found was in that. I came back [59] the sixteenth of February. Dick Burnhart came over every morning and started the fire and cooked there; he stayed there with me all the time.

;(Testimony of J. W. Willis.)

I remember one occasion when Gordon and Henderson were at the house that Lizzie Drake came to my house. I don't remember exactly what day that was; it was along about the fourteenth, I think, about as well as I remember. I couldn't recall the dates. They just came in the house when Lizzie came in there. She came in with a little basket of eggs, and wanted to know if I wanted to buy some eggs, and I told her no, I had some. Then she wanted to know if I would lend her twenty-five dollars to buy a horse at the Fort Keogh sale; they was having a sale on over there—I loaned her the twenty-five dollars.

Mr. MURPHY.—Q. At that time did you serve or give any intoxicating liquor of any kind to Lizzie Drake or those two men?

A. They wasn't in there ten minutes—

Mr. SLATTERY.—That isn't responsive to the question, and I object to it on that ground.

The COURT.—No; that isn't responsive. Read the question.

Last question read by the stenographer.

The WITNESS.—No, sir; I did not. (Continuing.) She said these were fresh eggs, and one of them spoke up and says, “I could eat some of them; we ain't had any fresh eggs for a long time.” She says, “If you're hungry,” she says, “come down to the house, and I'll cook you men the eggs.” She says, “I'll go down the alley and you can go down the street, and I'll cook you a meal.” They said they didn't know where she lived, and I says, “Boys,



(Testimony of J. W. Willis.)

I'll tell you where she lives." That was only a block from my place, and I showed them where she lived, and they went on down there. I never seen Hannah in the house but twice. I couldn't say how many times Gordon came to the house; I couldn't say how many times; I [60] think it was three days that he come; I don't know whether that's right or not. I tried to get this Victor Smith here as a witness, but I wasn't able to. He is in Colorado.

Cross-examination.

(By Mr. SLATTERY.)

Q. This Frank Kimball that you mentioned is the same Frank Kimball who has a case set for trial here in a few days from now, isn't he?

Mr. MURPHY.—We object to that as being immaterial and not cross-examination.

The COURT.—Objection sustained.

The WITNESS.—(Continuing.) I don't know where Kimball is. I saw him last Friday. The moonshine and whiskey in the cupboard belonged to him. I don't know when it was put in there. I had a contract in writing for the wreckage of that old building. I had that contract with Hunter. The party with whom I was contracting to remove it is a stranger to me. I know him after having made the contract with him, if I can think of his name. I didn't have anything to do with the wrecking of the building, only to take out my furniture that hadn't been burned. I say this whiskey that I had in my house was whiskey that I had left over



(Testimony of J. W. Willis.)

from the saloon. I'll be darned if I know when I did get that Green River whiskey in. I couldn't tell you when I went out of the saloon business even; I never kept any track of it. I don't know when I did get it. My saloon closed on the thirtieth of December, 1918. That's the day prohibition went into effect in Montana. I don't know whether this whiskey was whiskey I had on hand at that time or not. I didn't exactly testify to that in my direct examination. I said that this was whiskey that I had left over from the [61] stock that I had in my saloon. I don't know whether I did have this whiskey in my saloon in 1918 or not. I thought I did. I said so. I don't think I swore to that a while ago.

Mr. SLATTERY.—Now, I will ask you to state whether or not you did have it in your possession in that year, 1918, at that time that the saloons were running in Montana?

A. I know I packed away a lot of it.

Q. Answer my question, please.

A. I don't think I did have it then.

Q. If you so testified in your direct examination, you wish now to change your testimony, do you not?

A. I had a bunch—

Q. Answer my question: Do you wish to change your testimony I asked you?

A. I had quite a few bottles left over; I don't know; I can't say whether—

Q. I am not asking you that. I didn't ask that. I say do you wish to change your testimony?

(Testimony of J. W. Willis.)

A. No, I don't think—I don't know whether I had that or not.

Mr. SLATTERY.—May I have an answer to that question, your Honor?

The COURT.—Counsel advises you that you stated on direct examination that you had this whiskey from your old saloon. Now, he asks you if you want to change that. Was that right?

A. I think I had better change it, because I can't tell. I had whiskey left over and I got whiskey since, to tell the truth about it. I don't know whether this was old stock or some of it that I got since then.

The WITNESS.—(Continuing.) I do not know where the whiskey came from that Holmes was testifying about having taken out of my trunk on the night of the nineteenth of March. I know it was Green River whiskey. This looks like a bottle of it (indicating); it looks just like it. I couldn't say. [62] I put it in the trunk about the twentieth of March, I guess; I meant in February; I'll take that back; I meant in February, 1921. I took it out of the barn to put it in the trunk I had it buried in the barn. I buried it in the barn when I left to go to California. I left there the sixteenth of November, 1920. I got it in the cottage to put it under the barn; it had been in the cottage for a year and a half or two years, I don't remember.

Mr. SLATTERY.—Q. Then you did have it in the old saloon stock?

A. Yes. Oh, I had had that, I don't know how

(Testimony of J. W. Willis.)

long, when I left to go to California.

Q. You have answered that you did have it in the old saloon stock, haven't you?

A. There was some bottles I had of the old left over, and some I have got since.

The WITNESS.—(Continuing.) About the tenth of March some men came to my house and wanted to know if they could buy whiskey from me. Those men were Gordon, Hannah and Henderson. There weren't three of them; two came there first. The two were Gordon and Henderson. I don't know whether it was the tenth of March they came to my place and asked me to sell them whiskey; I couldn't say. It was along about that time. I said I can't remember the date. I don't think—I think it was about the eleventh or twelfth, as near as I can remember. The first time they came to my house, they asked me to have a drink, and wanted to sell me some whiskey. They came to me and asked me for whiskey. That wasn't the first thing they asked me for; they asked me to sell *me* some. They asked me to sell *me* some, after we had a drink of theirs. They offered to sell first and wanted me to sample it. I sampled it. Gordon had the whiskey—no, not Gordon, excuse me; Henderson had the whiskey. It [63] was a quart bottle.

Mr. SLATTERY.—Q. Now, do I understand you to tell the jury that they came over to your house day after day until the nineteenth, practically, and each time gave you a drink of whiskey out of their bottle? A. Why, they had a bottle.

(Testimony of J. W. Willis.)

Q. I didn't ask you that; answer the question.

Mr. MURPHY.—We object to that as being unfair to the witness; the witness hasn't testified that they came there day after day.

The COURT.—I think he said that Hannah came twice and Gordon three times.

Mr. MURPHY.—Yes.

The COURT.—Make your question correspond to the facts.

The WITNESS.—(Continuing.) I don't remember how many times between the fourteenth of March or the twelfth of March and the nineteenth of March any two of these men came there together. They were there three or four times; I don't remember; I didn't pay any attention. They weren't there each day, those two; they were there several times.

Mr. SLATTERY.—Q. Did you tell the jury that on each occasion that they came there between those days, they furnished you whiskey in your own home?

A. They had whiskey. Well, no; I don't think every time they didn't have whiskey; there was two or three times that they didn't have any.

The WITNESS.—(Continuing.) I deny now the testimony of these witnesses who said that I sold them whiskey on those occasions; I say that I never sold them any. I didn't give them any. I took a number of drinks from them. Yet, having it in my trunk, I offered them none in return. There might have been a bottle with a Green River label on it on

(Testimony of J. W. Willis.)

[64] the little shelf in the front room. There was whiskey in that. There was no whiskey glass there; I never had any glass there. That bottle with the whiskey in there was there the night that Mr. Farr and these other gentlemen came to my house. It might have been there also when Mr. Gordon and Mr. Hunter were there. I never kept a bottle of this Green River whiskey on the shelf in the front room all the time. I took it out every night. In the evening I took out the bottle and took a drink or two before I go to bed, and left it set there and in the morning I took another drink or two. I hadn't gone to bed that night. I couldn't tell the name of the woman I had in the house that night; they called her Hope was all I know.

Mr. SLATTERY.—Q. They called her Hope. What was she doing in your house at half-past eleven that night? A. No; there was a mistake in that.

Q. Do you deny the testimony of all these gentlemen as to their having been at your house at half-past eleven that night?

A. I'll tell you how it was—

Q. Answer the question. You'll have an opportunity to explain later. A. Why—

Mr. MURPHY.—Just a moment; let him have an opportunity to explain.

The COURT.—You will answer the questions as counsel puts them to you as long as they are permissible questions, which the Court, on the objection of your counsel, will determine. If there is any explanation due, it will come later, if it appears to



(Testimony of J. W. Willis.)

be proper. Read the question.

Last question read by the stenographer.

Mr. SLATTERY.—Q. You may answer that yes or no. A. Why, no; they weren't there.

Q. How long— [65]

Mr. MURPHY.—I submit the witness didn't understand that question. It is a negative question, and I ask that the question be read to him again, so that he may understand it.

The COURT.—Read the question.

Last question read by the stenographer.

The WITNESS.—A. They was there about half-past eleven, yes, at the time they got through.

The WITNESS.—(Continuing.) They got there about half-past ten. She had been in there not over twenty minutes before they came. With respect to the time that Mrs. Drake came there, I deny furnishing her a drink of whiskey.

Mr. SLATTERY.—Q. Do you recall being arrested about two weeks after the nineteenth of March in your own home, when you were intoxicated—

Mr. MURPHY.—To which we object as being immaterial and not cross-examination.

The COURT.—I think so; sustained.

The WITNESS.—(Continuing.) On the night of the sixteenth or seventeenth of March, when Mr. Gordon and Mr. Hannah were in the house, I do not recall carrying a vessel or chamber from the kitchen in the front room. On the seventeenth there was a woman in the front room. On the seventeenth

(Testimony of J. W. Willis.)

there was a woman or women in the front room.

Mr. SLATTERY.—Q. You remember you didn't allow these men Hannah and Gordon in the front room, did you? Your moonshine that you served them was in the kitchen, was it not?

A. Moonshine was served in the front room and kitchen, too. There was nobody in the front room, but they might come in the front room and pass the bottle around.

Q. Who passed the bottle around?

A. Gordon; not Gordon, but Henderson.

Q. What women were in the front room on that occasion?

A. Well, there was Alice Brown was one of them.  
[66]

Q. Who?

A. Alice Brown, a girl, and a married woman by the name of Gunderson; they was there on the seventeenth, and Mrs. Countryman.

Q. What is the occupation of Alice Brown?

Mr. MURPHY.—That is objected to as being immaterial.

The COURT.—It might be material; overruled.

Mr. MURPHY.—Note an exception.

The WITNESS.—(Continuing.) Alice Brown didn't have any occupation at all then. The occupation of the lady that I called Gunderson was a married woman. She was a housewife. Mrs. Countryman owned property; I don't know what her occupation was. She was just a property owner. Miss or Mrs. Drake is a rancher. She lives in Miles City

(Testimony of J. W. Willis.)

near me; she don't live over a block away. I don't know how long she has been there.

Redirect Examination.

(By Mr. MURPHY.)

The WITNESS.—Alice Brown had rooms rented in the hotel when I ran the hotel. This woman called Hope came there to buy the furniture. I was talking about leaving for California and she wanted to buy the furniture. She was living with her husband in Miles City. Mrs. Drake's ranch is, I would say, around a mile and a half from town, up the river in the country.

Witness excused.

**Testimony of Richard Burnhart, for Defendant.**

RICHARD BURNHART, a witness produced on behalf of the defendant in the foregoing entitled cause, having been first duly sworn, was examined in chief by Mr. Murphy, and testified as follows:

Direct Examination.

(By Mr. MURPHY.)

The WITNESS.—My name is Richard Burnhart; I live at [67] Miles City.

Mr. MURPHY.—Q. How long have you lived at Miles? A. J. H. Burnhart.

Q. How long have you lived at Miles City?

A. About twenty-three years.

The WITNESS.—(Continuing.) My business is harness and saddlemaker. I know the defendant, Mr. Willis. I have known him possibly twenty years;

(Testimony of Richard Burnhart.)

something like that. I live at three hundred Washington, Miles City. I know where Mr. Willis' cottage was that he was living in in March. I lived with him at that cottage. I came down there in the morning and started the fire and got breakfast, and was trying to watch the fellows that was wrecking that house there; there was two of them; sometimes more. I helped cook breakfast and wash the dishes when I got there in the morning, and looked around there while they were wrecking that building. They had tools in there that they were carrying back and forth, and I stayed in the house in the daytime. I would be there possibly early in the morning, and then along about nine or ten o'clock I would go in town and come back about three or four in the afternoon. Sometimes I stayed longer than that, according to how things were going. I know the witness Gordon and the witness Hannah who have testified here. I saw them down there, but I am not personally acquainted with them. I saw them down at Mr. Willis' cottage. I saw them down there, I think, along about the sixteenth or seventeenth of March, something like that; I don't remember exactly. I saw them there twice. Besides Gordon, Hannah, Mr. Willis and myself, there was a man there by the name of Vic Smith. Vic Smith was in there at one time. There was a fellow in there I think they called Pearl Anderson—Henderson. There was a fellow they called [68] Bones there, and a fellow they called Jay English, and another one, I don't know what his name is.

(Testimony of Richard Burnhart.)

It was about evening time, getting dark at the time I first saw these three men—Henderson, Hannah and Gordon; I was in Willis' house. English and Bones were in the house, too.

Mr. MURPHY.—Q. And yourself. And who came to the house first; Henderson and his two friends, or the others?

A. I believe the other party was there first.

The WITNESS.—(Continuing.) They were sitting there talking at the time when we came in; they were sitting there arguing and talking when I came in there. When Vic Smith and Henderson and Hannah and Gordon came in there, they were talking about a still they had somewhere on an island in the Yellowstone River. Pearl Henderson was talking about the still. He said he had one over there and he had lost it, and he had some stuff hid in the hills. He had some whiskey hid in the hills. There were some drinks had around there at that time. I went around the circle where they were sitting and picked up the bottle and took a drink out of it. I didn't see them bring the bottle there. I first saw the bottle going around the circle when I came in, and I went around and took a drink out of it. Those men came in through the kitchen door at that time; that would be the back door. They didn't stay there very long. I don't remember just the date that Hannah, Henderson and Gordon came there, but there was two times I saw them down there. I think it was after this time I have told about. At the time that I saw them there, I did



(Testimony of Richard Burnhart.)

not at any time see Mr. Willis produce any kind of whiskey or moonshine whiskey, and give or sell any of it to Gordon or Henderson or Hannah or anybody else. [69]

Cross-examination.

(By Mr. SLATTERY.)

The WITNESS.—I have lived in Miles City about twenty-three years. I am fifty-two years old. I am not a married man. I live some distance from this five hundred eleven Pacific Avenue; about eight blocks from it.

Mr. SLATTERY.—Q. When did you commence the habit of eating down there mornings and cooking your breakfast down there?

A. After I would get through with my chores in the shop, and when there wasn't much doing, I used to go down there.

Q. What shop?

A. In the shop I was working at, the saddle shop. We were practically laid off and there wasn't very much doing in that line.

The WITNESS.—(Continuing.) I was working for the Miles City Saddle Company. I am not working for them now; I quit when the weather got warm enough so I didn't have to build fires. That was about May. I was still in the employ of the saddle company in the month of March. It was two or three blocks where I was building fires for them from where this defendant was living. I was in the habit of going over to the defendant's place and building fires for him, and cooking my break-

(Testimony of Richard Burnhart.)

fast there and sitting there for a few hours, watching these fellows doing the work on the building. I wasn't getting any pay for that. I was in the employ of the saddlery company at that time, working at the making of saddles and harness. The reason I was off duty during those hours was that I didn't have anything to do, only I would go on shift every morning to see if I had anything to do. I wasn't working then at my trade; just building fires. I was watching the tools over there in the kitchen; they were in [70] the kitchen. The tools belonged to that house. I wasn't helping them in wrecking that building. I helped take down the bar fixtures, and the cases and stuff like that, and stored them in the barn. I helped Bones and Jay English a few days in doing that. Mr. Willis hired me to do that. He hasn't paid me anything. I worked at that just at odd times, whenever we got enough wreckage out of the road, so we could take the first thing out, about two hours a day.

Whereupon a recess was had in the trial of said cause until one-thirty o'clock P. M. of the same day.

July 12, 1921, 1:30 o'clock P. M.

Court convened pursuant to recess.

Present: Same as before.

The COURT.—You may proceed with the case on trial.

The WITNESS.—I said that I did drink whiskey in Willis' house in the month of March of this year; I don't know who did furnish that whiskey; it was just passed around and I got a drink of it. I don't

(Testimony of Richard Burnhart.)

know whether Henderson sold it or not. I received it from one of them that was sitting next to me; I don't remember just which one of them it was. I was sitting down at the time. I think this was the night of the seventeenth of March; St. Patrick's Day, I remember that. I believe this was that night; I couldn't say. This man I called Bones was in that room. Besides him and Willis, there was Bones and myself and Jay English and another party—I don't know what his name was, and four other parties. Prior to that time and in the month of March, while either Henderson or Gordon was there, I drank whiskey in that house. I helped myself to that, as to that. I got it off of the stand. I don't know what the label was on the bottle. There was a label on it. It wasn't moonshine; it was red whiskey. It [71] was a bottle that looked something like Exhibit "A"; the label looked something like that. It was standing on the little stand in his house there. I believe I was there alone at the time I took that drink. Mr. Henderson was not there then. I didn't understand you right when you asked me if I drank before in that house when either Henderson or Gordon was there. I didn't drink any except on this one occasion when they were in there. I didn't know of Henderson selling any whiskey there. I didn't see any business transactions performed.

Redirect Examination.

(By Mr. MURPHY.)

The WITNESS.—I was working for the Miles

(Testimony of Richard Burnhart.)

City Saddlery Company for wages. I didn't stay there all day at that time; business was quiet, and we divided the time up. I opened up the shop in the morning and waited until the rest of them came, and then I was through for the day. Gordon and Hannah and Henderson acted very much like they were under the influence of liquor when they were at the house.

Witness excused.

**Testimony of Paul Drinkert, for Defendant.**

PAUL DRINKERT, a witness produced on behalf of the defendant in the foregoing entitled cause, having been first duly sworn, was examined in chief by Mr. Murphy, and testified as follows:

**Direct Examination.**

(By Mr. MURPHY.)

The WITNESS.—My name is Paul Drinkert. I live thirty-three miles out of Miles City, on Pony Creek. In the month of March, 1921, I was at Miles. Right at that time I wasn't working at all, only on just a few jobs that I could pick up. I know Mr. Willis, the defendant here. I know where his place [72] is on Pacific Avenue.

Mr. MURPHY.—Q. Did you have occasion to be down around his place there in March, 1921?

A. Well, he had a little work there moving stuff out of his building to his barn.

Q. How long did you work for him doing that work?

A. I was around there two or three days.



(Testimony of Paul Drinkert.)

The WITNESS.—(Continuing.) I remember the witness Gordon and the witness Hannah and a man named Henderson coming to the house; I know them boys being in there. I saw them in the house there at Mr. Willis'. I can't just exactly say what day it was; I never paid any attention to that as to the date. I was there in the house when I saw them. I was in there when they come in; I was sitting in the house. I was just sitting there, visiting with Willis. I don't recollect just what time of the day it was. It was some time in the evening; I don't recall what time it was. English was in the house there, and that John, or Dutch they called him; I can't call his name now. I don't recollect his name. Jay English was one of them; I don't recollect their names. There were four of them, I think, came in, including Gordon, Henderson and Hannah; I don't know their names; I don't know either one of them. When they came in, they wanted to get a drink; they wanted to buy a drink. They asked Willis for a drink; he told them he didn't have any. Well, he says "We'll buy one ourselves," and one of the boys pulled out a bottle, a quart bottle; one of the boys that came in there. They kept the bottle with them. It was passed around; they passed it around and I had a drink out of it. They called it moonshine; I don't know what it was; moonshine whiskey, it must have been moonshine whiskey. They didn't stay there very long; I don't just remember how long it was. Mr. Willis [73] did not bring out or pass around any



(Testimony of Paul Drinkert.)

liquor. I did not see any money paid to Mr. Willis for any liquor. They wanted to know if there was any chance to sell anything in town; if there was anywhere they could sell anything. They said they had a plant or a still out in the country somewhere; they had some moonshine to sell, they said. I disremember who was talking about it; I don't know his name, one of the boys there in the room, one of those four in the bunch; I don't know the names of either one of them; I know I was sitting there when he was making these remarks.

Cross-examination.

(By Mr. SLATTERY.)

Q. Well, do you know Henderson when you see him? A. No; I don't know as I would know him.

Q. Would you know three of the men that you say you saw there on the night of the seventeenth of March?

A. I might recognize them if I was to see them.

Mr. SLATTERY.—Mr. Henderson, stand up. Mr. Gordon and Mr. Hannah, stand up, please.

Q. Look at these men, and state whether or not they are three of the men you saw there on the night of the seventeenth? A. I believe both of them are.

Q. There are three of them, one gentleman standing there (indicating)?

A. Yes, I think they are—was all there. I don't recollect, but I think they were there.

Q. Now, then, on the night of the seventeenth of March was the first time you saw them in that house, was it?

(Testimony of Paul Drinkert.)

Mr. MURPHY.—To which we object, if the Court please—

The WITNESS.—Just what time it was, I don't know; I don't remember the day—

Mr. MURPHY.—Wait a minute—

The WITNESS.—I don't recollect exactly what day it was. [74]

Mr. MURPHY.—Withdraw the objection.

Mr. SLATTERY.—Q. Did you see them in there more than one night?

A. They were in there two different nights that I was in there.

Q. Were they succeeding nights?

A. One night I came in and they had this bottle and I had this drink.

Q. One night you had this drink; did one night follow the other?

A. I think it was the second night; yes.

The WITNESS.—(Continuing.) One night followed the other. When they came in there the first night, I couldn't tell you which one it was asked if he could buy a drink; one of them said, "Will you buy a drink?" One of the three said, "I want to buy a drink." They came back and did the same thing the next night. Also the first night they said they wanted to buy a drink. The first night, after having said that, one of the men said, "We'll give you a drink," or words to that effect. He pulled a quart bottle out of his pocket; I couldn't say which pocket, whether it was a hip pocket or a coat pocket. I couldn't say which one of them it was

(Testimony of Paul Drinkert.)

that pulled the whiskey out of his pocket. It struck me as being unusual that these men should come there and want to purchase liquor from Mr. Willis and immediately give him whiskey for nothing; that struck me as unusual. It struck me as more unusual when they came back the next night and did the same thing. I didn't see anybody sell any whiskey there. I don't claim any of these three men sold any whiskey. I couldn't say whether I was in that house on the night of the sixteenth of March; I don't remember the date.

Mr. SLATTERY.—Q. Do you remember being there and discussing with Mr. Willis the fact that some bootlegger had got loose in the District Court of Custer County that day? [75]

Mr. MURPHY.—To which we object, if your Honor please, for the reason that it is immaterial and not proper cross-examination.

The COURT.—Oh, yes; it is to point his recollection to something that is alleged to have occurred. He may answer. Overruled.

Mr. MURPHY.—Note an exception.

The WITNESS.—A. Well, I don't—I remember talking about that around several different parties, as far as that goes. (Continuing.) I discussed that with Mr. Willis that night; I have an idea I did. I remember that Mr. English was also there during that discussion; English was there that night. This other witness who testified, Burnhart, that testified, was also there. I have an idea that Mr. Hannah

(Testimony of Paul Drinkert.)

and Mr. Gordon and Mr. Henderson also heard the conversation.

Mr. SLATTERY.—Q. They were there. In that conversation, didn't Mr. Willis say to you words to this effect: "Well, there is nothing for you fellows to get nervous about; there hasn't been anything done to you yet"?

A. Who? Mr. Willis? No.

Mr. MURPHY.—We object to that as not proper cross-examination.

The COURT.—I think it is. This is cross-examination. The objection will be overruled.

Mr. MURPHY.—Note an exception.

The WITNESS.—(Continuing.) I don't recollect nothing of the kind. I don't recollect anything like that said.

Mr. SLATTERY.—Q. Did you get a drink of whiskey out of a bottle containing a Green River whiskey label in Mr. Willis' house?

A. I did take drinks.

Q. Did you do that in March?

A. No; in the evening when [76] we come from our work, I found a bottle sitting in the house, and I just naturally took me a drink; you might say I stole a drink.

The WITNESS.—(Continuing.) I found a bottle that looked a good deal like this bottle (indicating), something similar. I saw a trunk in the front room. I did not look in that trunk. I did not know that he carried whiskey in there.

(Testimony of Paul Drinkert.)

Redirect Examination.

(By Mr. MURPHY.)

Q. You say you took a drink or did somebody give it to you, or did you just help yourself?

A. Just helped myself.

Q. Your work took you in and out of the house, bringing stuff from the burned building?

A. Yes.

Recross-examination.

(By Mr. SLATTERY.)

Q. What were you carrying from the burned building into this house?

A. Well, Willis had a bar and fixtures.

Q. What were you carrying from the burned building into this house, I say?

A. Well, he had some stuff that we moved over to the—

Q. What were you carrying from the burned building into this house?

A. It was part of a bar and the stuff that was in the burned building.

Q. Where did you put this part of a bar in Mr. Willis' house?

A. I couldn't say just what it was; it was bar fixtures and the stuff that was in the hotel and saloon.

Q. Where did you put them, I asked you, in Mr. Willis' house?

A. Put them in the back storage that he had in the background of the premises that he lived in.

Q. Was that a building separate from the house?

A. Yes.



(Testimony of Paul Drinkert.)

Q. Your duties, then, didn't carry you into the house at all, did they?

A. We would go in there and sit down and rest a [77] while.

Q. You didn't go into the main house with this stuff?

A. Not right in the main house; there was no use carrying this stuff in there.

Redirect Examination.

(By Mr. MURPHY.)

Q. Are you the one they spoke of as Bones?

A. Yes, sir.

Witness excused.

### **Testimony of Jay English, for Defendant.**

JAY ENGLISH, a witness produced on behalf of the defendant in the foregoing entitled cause, having been first duly sworn, was examined in chief by Mr. Murphy, and testified as follows:

Direct Examination.

(By Mr. MURPHY.)

The WITNESS.—My name is Jay English. I live at Miles City. I have lived there four years. In the month of March, 1921, I was doing odd jobs. I was doing some work for Mr. Willis. I started about the ninth or tenth working there, and worked until the twentieth or a little after, a day or so after. I was removing the bar fixtures from the burned saloon. I was taking those things back into his shed. During the course of my work there at that time, I had occasion to go into his house on that

(Testimony of Jay English.)

same lot. I saw the witnesses, Gordon and Hannah, there in that house just the once. That was on about the fifteenth, after supper. Bones and Burnhart and myself and Willis were present in the house. There were four came in there; there was Mr. Henderson and Vic Smith and two other gentlemen. They came in through the front way. When they came in, they first asked for a drink; one of the four asked for the drink; I think it was Henderson. Willis said he didn't have it. Vic Smith spoke [78] up and he says, "Do you want to buy some good moon?" He asked Mr. Willis that. Willis said, "No, sir." There was a word or two carried on; I didn't pay much attention to it, and I walked back in the kitchen for a drink of water. Willis never sold or gave any whiskey to those men that I saw. I had a drink of whiskey or moonshine. I got it from a quart bottle; it was passed to me by Mr. Bones. I couldn't swear who brought that bottle or where it came from; I don't know, but it was brought in from the outside by one of the boys that came in there. I should judge they were there between fifteen and twenty minutes or half an hour.

Cross-examination.

(By Mr. SLATTERY.)

The WITNESS.—I am a painter and carpenter. There wasn't any specified scale of wages when I claim I was working on that burned building; I got seventy-five dollars for the work. I worked for a little better than ten or twelve days. This stuff had all been in the fire. I wouldn't judge there was

(Testimony of Jay English.)

seventy-five dollars' worth of junk left there. I said I never saw any of these gentlemen until the night of the fifteenth of March; it was two days before St. Patrick's; that was just a day or two. It wasn't the sixteenth; it wasn't the day before St. Patrick's; I am sure of that. It was shortly after supper that I saw these four gentlemen come in the house, between seven and eight o'clock. When they came in, Bones, Rogers, Mr. Willis and myself were in there. I am a married man. I had supper that evening at home. I wasn't working; I was discussing what I was going to do the next day. I knew what I was going to do the next day, but there was a safe in there to be moved. [79] That didn't exactly require any discussion after supper on that night. My house was three blocks from Willis' house at that time. We all casually happened to be there. I remained there about three quarters of an hour that evening. There was a fellow named Vic Smith came in with these three gentlemen who stood up in the courtroom. Vic Smith didn't say anything when he came in. I didn't testify that Vic Smith wanted to buy a drink; I said Pearl Henderson. I won't be sure it was Pearl Henderson; one of the four boys wanted to buy a drink; I know it wasn't Vic Smith. The fellow that wanted to buy a drink said, "We would like a drink," wanted to buy a drink. He said that to Mr. Willis. Willis said he didn't have it. Then he asked him if he wanted to buy some moon, this same fellow—no, that was Vic Smith. Willis said no, he didn't want it. I don't

(Testimony of Jay English.)

know whether Henderson said anything. I had known Smith four years. He didn't tell me he had a moonshine still; he said Henderson had it; he didn't want to sell himself direct. It was Henderson had the still. He said Henderson had moonshine to sell. It was about three minutes after that that I had a drink. The whiskey was brought in from the outside. I couldn't swear who brought it in. I know it was brought in because there was no moon present when I came, because I had been there. I hadn't even seen a glass in the kitchen. I hadn't looked in the trunk that Willis had in the front room. I know there was no moonshine or whiskey in the house when I came in because Willis never left his chair; that is the only reason I have for saying that. I took a drink of it when it came around. Mr. Bones [80] passed it to me. I couldn't swear who purchased it. That is the only time I saw those men in that house.

Witness excused.

### **Testimony of Elizabeth Drake, for Defendant.**

ELIZABETH DRAKE, a witness produced on behalf of the defendant in the foregoing entitled cause, having been first duly sworn, was examined in chief by Mr. Murphy, and testified as follows:

#### **Direct Examination.**

(By Mr. MURPHY.)

The WITNESS.—My name is Elizabeth Drake. I live in Miles City. I know the defendant, Willis. I have known him about seventeen or eighteen years.



(Testimony of Elizabeth Drake.)

I know where he lives in Miles City. I am ranching for a living and I cater some. I had occasion to go to Mr. Willis' house one day last March, 1921. I remember the day; it was the twelfth of March. There were two men at Willis' house when I got there. Afterwards I knew one was Henderson and one Gordon. I saw the witness Gordon, who testified this morning; he was the one. The man who stood up in the back of the courtroom a little while ago, Henderson, was the other one. Mr. Willis was there. I went to Mr. Willis' house because I had to borrow some money to purchase some horses with. I had some eggs with me. When I went there there was nothing said about any intoxicating liquor of any kind. There were no drinks of whiskey nor any other liquor served me. I did not see anybody have any liquor. I stayed there about fifteen or twenty minutes. I got the money I went to borrow. When I left I went home, and these two men went down there and I cooked them a dinner, at least they helped me to cook it. That was at my house; that was just a little ways from Willis'. [81]

Cross-examination.

(By Mr. SLATTERY.)

The WITNESS.—I am a Misses. I remember distinctly on the twelfth of March going to Mr. Willis' place, of course. When I went in the house, Mr. Henderson and Mr. Gordon were in there, as I heard them testify. I don't recall that Mr. Henderson ordered a drink of whiskey and that Mr. Willis got up and went over to a little shelf and took off a



(Testimony of Elizabeth Drake.)

bottle that looked a good deal like this (indicating). He did not pour it out of the bottle into a glass and hand me the glass and that I lifted it up before him and said, "Here's how." I do remember that those two men went to my place and I cooked them some eggs. They didn't walk to my house with me. It was at my suggestion that they did not walk to my house with me. I suggested that because people around there talk so much. They would talk if they saw me taking men to my house. I did not know that by experience; I assumed that. However, these men went to my house and I did cook some eggs for them. While they were in my house, they did not purchase any whiskey from me.

Mr. SLATTERY.—Q. Isn't it true that you sold to Mr. Gordon and Henderson a drink of whiskey similar to this, or Canadian Club whiskey?

A. No, sir.

Q. Isn't the fact about that also that after they had drunk that drink, you then reached behind the stove and picked up a bottle of moonshine—

Mr. MURPHY.—We object to that line of cross-examination on the ground that it is improper, and immaterial, so far as this case is concerned.

The COURT.—I think it is related to part of the transaction which the witness testified to. He has a right to show all the circumstances and ask her if other things occurred. Objection overruled. [82]

Mr. MURPHY.—Exception.

Mr. SLATTERY.—Q. I am referring—

A. No, sir.

(Testimony of Elizabeth Drake.)

Q. I hadn't finished my question. That you reached behind this stove after they came there and picked up a bottle of moonshine and gave them a drink of moonshine whiskey out of that bottle that you had there?     A. No, sir.

Q. You don't remember that?     A. No, sir.

Q. It is a fact that you also are a defendant in a criminal action pending in this court and set for trial on the fourteenth of this month, in which you are charged with violating the National Prohibition Act; isn't that true?

Mr. MURPHY.—To which we object as immaterial.

Mr. SLATTERY.—For the purpose of showing her interest, if the Court please, in testifying in this case.

The COURT.—I think I can see where counsel might make it proper cross-examination for the purpose of showing the interest of the witness, if he is intending to ask whether these witnesses are to be witnesses for each other, or the defendant or his witnesses will appear in her behalf. We must assume that he is proceeding on that theory. The objection is overruled.

Mr. MURPHY.—Note an exception.

The COURT.—It may be noted.

Mr. SLATTERY.—Q. And in the trial of your case, Mrs. Drake, you expect to use as witnesses some of the persons who are witnesses here in behalf of Mr. Willis?     A. Only Mr. Willis.

Q. You expect to use Mr. Willis as your witness?

(Testimony of Elizabeth Drake.)

A. Yes, sir; just the one case.

Mr. MURPHY.—We offer Defendant's Exhibit One in evidence, which was identified by the witness Gordon on his cross-examination as having been signed by him. It is a statement contradictory to the statement he gave on the trial this [83] morning.

The COURT.—It wouldn't make it admissible in the manner in which it was presented. Objection sustained.

Mr. MURPHY.—Note an exception.

**Testimony of Frank Hunter, for Defendant.**

FRANK HUNTER, a witness produced on behalf of the defendant in the foregoing entitled cause, having been first duly sworn, was examined in chief by Mr. Murphy and testified as follows:

**Direct Examination.**

(By Mr. MURPHY.)

The WITNESS.—My name is Frank Hunter. I am an attorney at law at Miles City, Montana.

Mr. MURPHY.—Q. Were you present in court in Custer County, in the month of April, 1921, when Mr. Gordon was then accused of the same acts as he now stands accused of in this court?

Mr. SLATTERY.—I object to that on the ground that no proper foundation has been laid, it calls for a conclusion of the witness, and is not the method of proving the fact.

Mr. MURPHY.—I will reframe the question.

(Testimony of Frank Hunter.)

Mr. SLATTERY.—I will consent to the substitution of the word “tried” and yet renew my objection.

Mr. MURPHY.—This is preliminary examination on a question of impeachment which I laid the grounds for.

The COURT.—Objection overruled; he may answer.

The WITNESS.—Yes.

Mr. MURPHY.—During the examination of Gordon, who was then a witness, did he testify at that time that he didn’t know whether it was whiskey or moonshine?

Mr. SLATTERY.—May I ask a preliminary question in order to settle as to what he is inquiring about?

The COURT.—The witness Gordon testified that in a proceeding [84] arising out of these same transactions, as I understood it, against the defendant in Miles City, in the State Court, Gordon was asked—on April, 1921, if he did not testify in that case that whatever he got out of the defendant’s premises, he did not know whether it was moonshine or not, and he answered that he did not remember that he so testified; I assume that is the foundation for the question. You may proceed.

The WITNESS.—A. Yes; he said that he didn’t know whether it was moonshine or whiskey; he couldn’t tell.

(Testimony of Frank Hunter.)

Cross-examination.

(By Mr. SLATTERY.)

Q. As a matter of fact, he testified in that search warrant proceeding that he got both, didn't he?

Mr. MURPHY.—We object to that as not cross-examination. We haven't gone into the search-warrant proceeding.

The COURT.—Make it clear to the witness that it was the same matter.

Mr. SLATTERY.—Withdraw the question.

Q. At this time that you heard Mr. Gordon testify, it was in a search-warrant proceeding against Mr. Willis, wasn't it?

A. The case was so entitled; yes, sir.

Q. And it was a proceeding in which they had seized out of his house a quantity of whiskey; is that true?

A. That is the record of the testimony.

Q. This was in April?

A. April sixteenth, 1921.

Q. Was that search, do you know, was the search made in March that we were discussing in this case?

A. There was only one search that I know of.

Q. You don't know whether—

A. Yes; it was this search. That was what the testimony showed at that time.

Q. In that proceeding, the Court there found against Mr. Willis, did it not? [85]

Mr. MURPHY.—To which we object as not being cross-examination.

The COURT.—That isn't material; I don't see



(Testimony of Pearl Henderson.)

that it is proper cross-examination, no matter what disposition was made of the case. Objection sustained.

Witness excused.

Mr. MURPHY.—Defendant rests.

**Testimony of Pearl Henderson, for the Government  
(In Rebuttal).**

PEARL HENDERSON, produced as a witness in rebuttal on behalf of the Government in the above-entitled cause, having been first duly sworn, was examined by Mr. Slattery, and testified as follows, to wit:

Direct Examination.

(By Mr. SLATTERY.)

The WITNESS.—My name is Pearl Henderson. I am a married man and have a family. My home is at Forsyth, Montana. I have been in the cattle business down there all my life. In the month of March of this year I was in the employ of the City of Miles City, Custer County, in this State. I know the defendant, J. W. Willis. I know where he lived in Miles City in March of this year; I know where his residence is. It was a little green house near a burned building, at five eleven Pacific Avenue. I was in that house in the month of March of this year.

Mr. SLATTERY.—Q. What is the first time you were in there?

Mr. MURPHY.—To which we object as not

(Testimony of Pearl Henderson.)

proper rebuttal testimony. This is part of their case in chief.

The COURT.—The testimony may be competent either in chief or on rebuttal. It serves a different purpose, however. If it is submitted in chief, it is evidence of the facts which it tends to prove in support of the prosecution for all purposes; but if it is submitted in rebuttal, it is for the [86] purpose of neutralizing, if it can, the testimony of the defendant, and it is still competent.

Mr. MURPHY.—Note an exception.

Last question read by the stenographer.

Mr. SLATTERY.—Q. That is in Willis' house?

A. About the third day of March.

Q. And who, if anybody, introduced you to Mr. Willis? A. Vic Smith.

Q. Vic Smith; on the second day in March that you were in there, did the defendant Willis sell you any whiskey?

Mr. MURPHY.—To which we object—may we have the same objection to all this line of examination?

The COURT.—You may have an objection noted to all testimony thus adduced by this witness.

Mr. MURPHY.—Note an exception.

The COURT.—The objection will be overruled, and an exception may be noted to all this line of testimony.

The WITNESS.—A. Yes, sir. (Continuing.) Vic Smith was there when he sold it to me. I was there after the second of March; I don't remember

(Testimony of Pearl Henderson.)

exactly the date, but I was there. I was at Willis' place and I don't remember of missing a day from then, from the second of March till the nineteenth. I don't remember of missing a single day out of all that time. There was not a single day during that time when the defendant Willis did not sell me whiskey. Every time that I was there between those two dates, I purchased whiskey from the defendant Willis. The whiskey that he sold to me he got from the back end of the room in front of a cupboard there or a clothes closet or something, in the back room. I remember of seeing a shelf in the front room. I remember of seeing a bottle [87] there with a Green River whiskey label on it. He charged me four bits a drink, fifty cents a drink. I never on any occasion offered to sell any whiskey to Mr. Willis. I heard his testimony here in that respect. I deny that. I remember being there in the month of March, about the sixteenth, when a man by the name of Bones was there, together with other persons; I believe I do; I know I was there at the time that Bones was there. I remember a conversation had there that night about a bootlegger having gotten loose in the District Court that day. Willis just said they didn't have any kick coming; that they hadn't done anything to him yet.

The COURT.—Q. Done anything to whom?

A. The fellow that they tried.

Mr. SLATTERY.—Q. During the month of March, between those dates, did you see a man in there by the name of Vias? A. Yes, sir.

(Testimony of Pearl Henderson.)

Q. Did you, or did you not, see him purchase any whiskey from Mr. Willis?     A. Yes, sir.

Q. How was it—what was the whiskey in?

A. In a can.

Mr. MURPHY.—This is objected to as improper; it was never brought out in the case in chief nor on cross-examination.

The COURT.—I assume that this is some time in March; the defendant has testified that he didn't sell any at that time.   Objection overruled.

Mr. MURPHY.—Note an exception.

The WITNESS.—(Continuing.)   Mr. Gordon was with Mr. Vias and I in there. Mr. Vias paid Mr. Willis fifteen dollars for a quart of whiskey. The bottle was labeled; it was a quart of Blue Ribbon whiskey. I noticed three Green River labeled bottles there at that time. In the month of March I remember seeing Mrs. Drake in Mr. Willis' house along about [88] the tenth or twelfth. Mr. Gordon was with me when I saw her in the house. After Mrs. Drake came into the room, I bought a drink for the four of us of Mr. Willis; Mr. Willis furnished the whiskey. The witness, Mrs. Drake, took a drink. Mr. Willis handed her the whiskey. When he handed it to her, she said, "Here's a go," and drank it. After she left the place, Mr. Gordon and I went to her place that same day. While we were up at her house, she cooked some eggs for us. We ate them there. On that occasion, while we were in Mrs. Drake's house, we purchased some whiskey from her. I paid her fifty cents a drink

(Testimony of Pearl Henderson.)

for three drinks, and she rushed around the door behind the stove and got a bottle and gave me a drink of moonshine, and told me to try that. The whiskey she sold me for fifty cents a drink was Canadian Club. I never at any time in Mr. Willis' house gave him or anybody else a drink of whiskey, only what I bought from him. I never at any time carried into the house of Mr. Willis any whiskey; I never had a bottle with me of any kind. I never saw Gordon hand out or deliver or give anybody a drink of whiskey or moonshine in Mr. Willis' house. All of the whiskey I got in Willis' home I got from Mr. Willis, the defendant in this action.

Mr. MURPHY.—If your Honor please, I move to strike out the testimony of this witness as not proper rebuttal testimony, save as to the one question where he testified that he never had offered for sale any whiskey to Willis as to the times he was at the cottage there.

The COURT.—Motion denied.

Mr. MURPHY.—Note an exception.

Witness excused. [89]

**Testimony of T. R. Gordon, for the Government  
(Recalled in Rebuttal).**

T. R. GORDON, recalled as a witness on behalf of the Government in rebuttal, having been heretofore duly sworn, was examined by Mr. Slattery, and testified as follows, to wit:



(Testimony of T. R. Gordon.)

Direct Examination.

(By Mr. SLATTERY.)

Q. You recall having testified about Mrs. Drake having a drink of whiskey in Mr. Willis' place in March of this year?     A. Yes, sir.

Q. Now, after drinking there on that occasion, tell the jury whether or not you and Mr. Henderson went down to her house?     A. Yes, sir.

Mr. MURPHY.—Objected to as not proper rebuttal testimony.

The COURT.—Objection overruled; an exception may be noted.

Mr. MURPHY.—Exception.

Mr. SLATTERY.—Q. While in her house, Mrs. Drake's house, state whether or not she sold any whiskey to either yourself or Mr. Henderson.

A. Yes, sir.

Q. Who paid for it?     A. Mr. Henderson.

Q. How much did he pay?

A. I wouldn't say what he paid for it; I didn't see that.

Q. Can you tell the jury what kind of whiskey it was that was bought from Mrs. Drake at that time?

A. It came out of Canadian Club quart bottle; it had a Canadian Club label on it.

Mr. MURPHY.—The same motion as to the previous witness' testimony.

The COURT.—And a like ruling with respect to this testimony.

Mr. MURPHY.—Exception.

Witness excused.

Mr. SLATTERY.—The Government rests.

Whereupon counsel for the respective parties presented their argument upon the law and facts to the Court and jury, and the Court instructed the jury as follows: [90]

### **Instructions of Court to the Jury.**

Hon. GEORGE M. BOURQUIN, Judge:

Gentlemen of the Jury: You have heard the evidence and the argument of counsel, and now it is for the Court to deliver to you what are termed the Instructions or Charge. That is in the main to advise you of what the law is, so that you will be able to determine from the facts whether the law has been violated. The Court is responsible for the law, and it is your duty and obligation to take the law from the Court. There is a good reason for that: it is so that all men may be tried by the same law, for the Court always gives the law the same. If juries were permitted to take their own view of the law, one jury might to-day have one view, another jury to-morrow have another view of the law, and yet another jury have a different attitude with respect to the law, and men would not all be tried by the same law, but by as many different kinds of law as different juries conceived it to be; but when it comes to the facts, and what the evidence proves, what witnesses you will believe, what weight you will give to the testimony, what logical inferences you will draw from the circumstances in the case—that is entirely for you to determine. Your responsibility begins there; you determine the facts for

yourselves. The Court cannot tell you what the facts are, nor bind you to its view of the facts as given by the witnesses who appear before you. Courts are privileged to comment upon the credibility of witnesses and upon the weight of the evidence, and upon what is [91] proven and what is not proven, in the Court's judgment; but that is not in an effort to bind you to like views, for it cannot, and the Court has no right to bind you by its comments; and when it is done, it is solely for the purpose and object of aiding you to reason the case out to a correct conclusion.

I want to remind you, as you sit in the jury-box, that you are like the Judge in the exercise of his duties; you are bound by the same oath and act under the same obligation and sacred duty to judge fairly and wisely, except that your duty relates to the facts, and the Court's to the law. You are officers of the court just as much as the Judge is. You are judges of the facts; I am judge of the law. Both of us are bound by our oaths to fulfill our duty, and you must remember that we both have rights and obligations, as well as power; but we never exercise our power except within the strict lines of our duty. For instance, the Court might discharge this man, this defendant, from the bar of the Court, and no one on earth could again try defendant for this offense; but the Court has no right to do that. So you, after you have reviewed the evidence, may believe him guilty beyond a reasonable doubt, and yet acquit him, or not so believe and yet convict him. You have no right to do it. By

your oath, you will remember, you swore that you would a true verdict render in accordance with the law and the evidence; not in accordance with your own likings, which I will, of course, not intimate is not in accordance with the law and the evidence, and not in accordance with your sympathy or prejudice; but your oath is that you will a true verdict render in accordance with the law and the evidence, setting aside any and all bias or prejudice you might [92] entertain. Never forget that.

In respect to the law involved in this case, the famous Volstead Act, passed by Congress to carry out the provision for national prohibition, it is to effectuate a constitutional amendment, and it is just as much a law as any other law upon our statute books. We all know that no law ever written is being violated or has been violated to a greater degree than the Volstead Law is now; but that is only the more reason why it must be enforced, as long as it is the law, with diligence and faithfulness, so that this tendency to violate this law may not, as it inevitably will if its violations are condoned or permitted to continue unpunished, tend to encourage the violation of other laws; because, when people discover that one law may be violated with impunity, that courts and juries are impotent to enforce the law, there is a general tendency to transgress other laws, a failure to give due observance to law, and, as a result, a breaking down of morale. In other words, if a man may break the law and escape the consequences of his act, people say, "If one set of men can violate one law and escape, what



is the use of the rest of us observing any law?" So it leads to the violation of other laws, and a breakdown of the morale of the people.

Another thing in reference to this Volstead Act: People comment upon the fact that with many people it is not a popular law; many people are opposed to its spirit. They argue about this way,—that men drawn in the jury-box in a case involving a prosecution for the violation of its provisions, will return a verdict of acquittal; that they are against the spirit and operation of the law; [93] that it is not right, so they will fail to enforce the law, and will permit the offender to escape. They argue to themselves further: "If I am accused of a violation of this law, it will only be necessary for me to swear to any sort of a fictitious defense to give the jury a plausible excuse in order to secure my acquittal."

Gentlemen of the jury, that is a thing that must be suppressed as not well founded. I will say that in the Federal Court I have not found it to have any basis of truth, so far as juries are concerned. Of cases that have come up in this Court, there have been as many convictions that were merited under this law, as in respect to any other law. Why do I say this to you? Not to say that this defendant ought to be convicted; not at all. I merely wish to impress upon you the seriousness of your duty in every one of these cases as in any other case that may be brought before you, and that you give to it the same serious, thoughtful and honest consideration; that you execute and carry out your duty, your



obligation and your oath, whatever the verdict may be.

You must remember that you are not responsible for the fate of this defendant; if the defendant is guilty, he is responsible for the consequences of his voluntary acts. He has no right to come into court and expect that any jury will inevitably accept his version rather than the prosecution's, find for him and against the prosecution. Both sympathy and prejudice are enemies of justice. Remember, your honor, your duty to the people, whose servants you are, and your oath require faithful performance of duty in this, as well as any other case.

Now, gentlemen, the law in this case provides that any [94] room or building wherein intoxicating liquor is sold or kept in violation of the Volstead Act is a common nuisance, and any person or persons who maintain such a place are guilty of an offense which, upon conviction, involves a punishment of a fine of not more than one thousand dollars, or imprisonment for not more than a year, or both. The Court, and not you, however, will fix the punishment, and you will see it leaves very much to the discretion of the Court. Of course, you have nothing to do with that, and I state it to you merely for your information, and you are assumed to know it anyhow.

The information in this case charges this defendant with maintaining such a common nuisance—a place where intoxicating liquor, to wit, whiskey, was being sold in violation of law for beverage purposes. Any intoxicating liquor sold for beverage purposes

is in violation of the law. There is no exception in the law that permits such sale to be made.

A nuisance is defined to be a place where unlawful acts are carried on to such an extent that they actually annoy the neighborhood; but, in contemplation of law, annoying the neighborhood does not necessarily mean a noise or audible disturbance; it may be constructive annoyance. If we find a series of unlawful acts committed, like disorderly houses, gambling or prostitution, that stamps the places wherein committed, as nuisances; and that is the situation in this case,—if this defendant sold liquor in that place—not a single, isolated sale, but a series of sales—that place is a nuisance within the meaning of the law.

This defendant is presumed to be innocent of that offense until he is proven guilty beyond a reasonable doubt, and that presumption must be had in mind by all [95] of you throughout the trial. It simply means that you do not know, when the trial starts, whether he is innocent or guilty, so we will presume he is innocent, and with that status in mind, you, the jury, will weigh the evidence against him and the evidence for him to determine whether, in spite of the presumption of innocence, he is guilty as charged, beyond a reasonable doubt.

The burden is on the Government to prove that the defendant is guilty, beyond a reasonable doubt, before you can convict; but, when you ask yourselves whether that burden is sustained, you do not look to the evidence of the Government alone; you take into consideration the evidence of the defend-

ant also,—all of the circumstances in the case, and, considering and weighing the whole, determine whether or not the evidence taken as a whole satisfies you that the defendant is guilty beyond a reasonable doubt. If it does, you should find him guilty; if it does not, you should find him not guilty.

Remember the proof must only go to guilt beyond a reasonable doubt. It is impossible to prove everything beyond all doubt. A mere suspicion that after all the defendant might be innocent is not sufficient to warrant an acquittal; therefore, the law does not require absolute proof, because that is impossible. Nothing can be proven in court except to a degree of probability; in a criminal case it must be a high degree of probability, sufficiently high to satisfy you that the defendant is guilty beyond a reasonable doubt.

To define the term “reasonable doubt” is not easy, but courts attempt it. These words ought to convey as [96] much the meaning as any other manner of expressing the idea. You know what it is to doubt, and you ought to know whether, in this case, you have a reasonable doubt of the defendant’s guilt; but others attempt to define it, and I will define it this way: After you have reviewed all the evidence and all the circumstances, if you have a judgment that persists in staying with you that, to a high degree of probability, the defendant is guilty, and to such an extent that you are satisfied beyond a reasonable doubt of his guilt, it is your duty to convict. In one case the Supreme Court has said that “if the high degree of probability is such that

you have no reasonable doubt of the guilt of the defendant, then it is your duty to convict.”

You are the exclusive judges of the credibility of witnesses, and of the weight to be given to evidence. In the beginning, not knowing whether a witness will testify truthfully, whether he will tell you the true facts or not, there is a presumption which the law creates, the presumption that he speaks the truth; but you are the sole judges of his credibility; unless you may honestly see a reason why you should not believe him, the law is you presume that he is telling the truth. You are the judge of his credibility; you observe his demeanor on the stand, the manner in which he testifies, whether he appears to be telling the truth, or otherwise; whether he is frank in his statements, or seems desirous of concealing or hiding something, indicating that he is not telling all that he knows, or the full truth; whether he has any interest or any motive in not telling the truth; his character, in so far as it appears; his disposition, so far as it is disclosed to you; this may aid you in arriving at your determination as to whether a witness is speaking the [97] truth. Does he state what is reasonable, in view of all the circumstances of the case? Reasonableness is the great test of truth. Is he contradicted by himself or other witnesses? Do you prefer to believe his story? It is for you to say which one you believe. It may be that he is contradicted by circumstances; sometimes circumstances speak more loudly than words. It is a maxim of law that



witnesses may testify falsely, but circumstances will tell the truth.

If you believe that any witness has testified falsely in any matter before you to-day, you ought to distrust all the rest of the testimony of that witness, and, if your judgment approves, you have a right to reject all of the testimony of that witness; if he has testified falsely in one thing, how will you determine whether he has not testified falsely in other things? It is true that if a witness testifies from mistake incorrectly, that is not what is meant by "falsely." Mistakes in dates, for instance, are not always material in law; a witness might easily become confused in his memory of dates. Falsity usually conveys the idea of intentionally testifying falsely. Of course, if a witness is mistaken in some of his testimony, you want to scrutinize it carefully and see if he be not mistaken in other parts of it.

The status of a witness applies also to the defendant when he testifies in his own behalf, insofar as he is not contradicted by his own testimony or that of other witnesses. The law says that he shall have the benefit of that presumption that he speaks the truth in the beginning; but in his case, as in that of any other witness, you might see an honest reason why you will not presume that he speaks the truth; you might see it in any or all the ways that would apply to any other [98] witness; you might see it in his self-interest, in the very fact that he is the defendant, that he is charged with a serious offense with consequences grave enough to him, in any event, if convicted. Ask yourselves whether that



self-interest which is the mightiest influence that moves all men, has caused the defendant to deviate from the truth in the hope to deceive you and escape the consequences of his crime, if he committed it.

Gentlemen of the jury, the testimony in this case has covered a pretty wide range, considerable ground by quite a number of witnesses; yet, after all, it converges about a single issue: Did this defendant sell whiskey in his house in Miles City, as has been testified to by Gordon, by Hannah and by Henderson—I think those are all the witnesses who testified to the sales?

The prosecution first proceeded at considerable length to show to you by the Mayor of the city, the City Attorney and several others that, with the aid of a search warrant, his place had been visited, and a great deal of whiskey had been found there, both moonshine and bonded goods; both illicit whiskey and licit whiskey, lawful whiskey and unlawful whiskey. That stands undisputed; that portion is conceded by the defendant himself, I believe. The whiskey was there, though he denies that he owned any of the moonshine or illicit whiskey that was found in the cupboard in the kitchen.

After the case is so far established that the liquor was there, which of itself is not sufficient to constitute the offense charged, then the Government introduces Gordon and Hannah, who testify to having repeatedly visited that place last March and purchased whiskey from this defendant at fifty cents a drink—a profitable trade, if it can be [99] carried on for any length of time. They were in

the employ of the county and city. The Court incidentally stated that it was an honorable occupation; it is a fact that all men do not care to follow the vocation of one who has a duty to detect criminals; but it is like many vocations we do not care to follow, yet which are still necessities. Most men do not care to take up the work of a garbage collector or scavenger, but we have quite a distinct need for them, and if they perform their duties well and do good work, their occupation is as honorable as that of any man's, no matter what it is. They tell you they were hired to do this, and they went there. They had a right to seek out these places where this whiskey is being sold, and that is the only way the law can be enforced; you know that the real customer, who is constantly seeking illicit liquor for the sake of his appetite, is not going to betray the men who sell to him; because if he does, his supply is cut off, his appetite disappointed, and perhaps his cravings really cause him suffering. These men who thus seek for this evidence are, in another sense, no more than policemen, no more than sheriffs, no more than marshals; for policemen, sheriffs and marshals have their duties to hunt for and detect crime whenever they can, consistent with their other duties; so beware of being prejudiced by the words "detective," "stool-pigeon" or anything of that kind, for they are thrust upon you in every case, with the idea that you are not sufficiently strong of will to resist the prejudice which, in many men's minds, these words do create.

These two men, Gordon and Hannah, told you of

being at this defendant's house, and of seeing there numerous other men, of hearing the voices of others in another room, of seeing one woman there, and of hearing the voice of another [100] in an adjoining room. They tell you of how the defendant prevented them from seeing what was going on in the front room when they were in the kitchen on one occasion and several other parties were there. Smith and Henderson were also along, I believe. They detailed, at considerable extent, quite a number of purchases of liquor early in March, the dates of which I will not relate to you again; because, as I told you before, dates are not material. They may allege one date in an information and prove another date. The reason is that men's recollection of dates are imperfect and notoriously bad. You may recollect an incident which happened all your life; yet you forget the particular day of the month on which it happened. One date may be alleged in the information and the prosecution may prove another, and if the jury believe the offense was committed on a date or dates other than those alleged, they still have their right and duty to convict accordingly.

They tell you, these witnesses, Gordon and Hannah, of buying both moonshine and whiskey of the kinds which were thereafter found by Farr, Wilkinson and several others who raided the premises a few days later, on the nineteenth, I believe, of March. That is the case for the prosecution.

Now the defense introduces its case. The defendant tells you, "Yes, I had this lawful whiskey, these bonded goods, in my premises. I had them from the

time when I had kept the saloon adjacent to this house; had it buried in the barn, and after I came back from California, I brought in into the house." He tells you further that he had nothing to do with the moonshine or illicit whiskey, and didn't know of the whiskey that was in the cupboard; he had the house rented to Kimball while he was in California; Kimball lived in [101] the house during the time Willis was in California. The defendant stated that he came back to Miles City on the sixteenth of February, and stays until March nineteenth, over a month, and yet had not had access to that cupboard; and yet the witness, Henderson, who went on in rebuttal, testified that the whiskey that he got at one time did come out of the cupboard in the rear room. When the officers were there that night, they say that he told them that he had no key to the cupboard; or I think they said that they did not know whether he spoke of a key or not, but he refused, as they put it, to open the cupboard, and they then forced it open and found the moonshine. The defendant insists that that was Kimball's moonshine, and that it had been placed there without his knowledge. That will be a question for you to determine. Ask yourselves this, gentlemen: Did he see the impossibility of denying having the liquor at all, in the face of the testimony of Farr and Wilkinson, Holmes and others, who found it there, and therefore admitted part of it about having possession of the bonded whiskey, and laying part of it onto Kimball about having no knowledge of the moonshine or illicit whiskey in the cupboard to which



he testifies Kimball had the key, and insisting that he did not sell them whiskey, as Gordon, Hannah, Henderson and others testify. I say you can ask yourselves. The Court doesn't say that he did, the Court doesn't intimate that he did; and whether or not it is an ingenuous defense or a truthful one is entirely for the jury to determine. He denies that he sold any whiskey at all to Gordon and Hannah, and says they came there with Smith and others, asking for liquor; that he told them he had none, when they produced a bottle of moonshine and gave him a [102] drink and several others. He admits they came there a series of days, and had much the same transaction each time; that they brought liquor with them; that they got none from him; that he had liquor there in his trunk, but that he never responded by treating again. Ask yourselves this: whether Smith, who took them there and introduced Henderson and the others to the defendant in the first place, whether or not Smith was the agent of the defendant. Ask yourselves how these officers would find their way there if they were not taken there by someone who knew the liquor was there. Why did the defendant tolerate these men around there unless they were customers, whose patronage, at fifty cents a drink, was a profitable one? It may be reasonable that these officers might have been any place once and have asked for liquor and be denied; but why should they keep returning unless they were securing the evidence that they were entitled to secure? Defendant says further that they offered to sell him moonshine; they asked him if he wanted to buy some;



that he said no; that he was going away soon and did not want to take the chance of detection and prosecution. The defendant introduced witnesses further testifying, and the defendant himself testified, that he was salvaging part of his hotel, and that he had men working there in the vicinity of his house to account for the numbers of men who Gordon and Hannah say they saw around there. Question yourselves as to whether it is a truthful defense or a subterfuge to explain the presence of the numerous men who were around there whenever Gordon and Hannah happened to be there. It is question, for the jury entirely, and it may well be that the testimony of the defendant and those witnesses of his was true to the effect that he was salvaging the contents of the burned hotel; and ask yourselves [103] whether this is a corroboration of his statement that he did not sell liquor to these men. Corroboration means circumstances or the testimony of a witness that tend to make more true or probable the evidence of another witness or some material evidence in the case. Everything that is offered in the nature of corroboration is not necessarily corroboration. It recalls to my mind that Judge Knowles used to illustrate the meaning of the term in this way: If a witness takes the stand and swears before you that down the street he saw an elephant climbing a telegraph-pole, and as an evidence of the fact, he can take you down and show you the pole, the mere fact that he showed you a pole would not constitute corroboration, or lead you to believe his story as true. You are not obliged to believe that a thing is so be-

cause a witness says it is so. On occasion there may be men who will swear to anything for both plaintiff and defendant, and it is for you to determine which of them is telling the truth. That is what you are here for—to penetrate these evasions and contradictions and arrive at the truth, in order to execute the law, whether it is a verdict of guilty or acquittal which you find; because a verdict of acquittal executes the law just as much as a verdict of guilty, if you are not satisfied that the defendant is guilty beyond a reasonable doubt. The law says you must acquit him in a proper case, as well as convict in a proper case.

The defendant proceeds further with his defense: he has Burnhart testify. Burnhart testifies to being a harness maker; said that he lived a while last March with the defendant. He was employed at a harness shop, but he stayed at the defendant's place a considerable portion of the time; [104] that he watched the men who were salvaging the burned building; that he watched the house when they were salvaging part of the old hotel and the effects from the old hotel which had burned there sometime before that. He told you that these men, Gordon and Hannah, came there, and others also; I believe he said that they asked for a drink, which was denied them, and that there was a bottle passed around, and that he drank out of it, but he doesn't know who produced that bottle. He didn't see anyone sell any liquor; didn't see the defendant give anyone any liquor or sell any liquor. The question for you to determine is: Is Burnhart desirous of serving the

defendant and a little careful in seeing how far he might go in testifying for the defendant with safety, or, is he telling the truth in all of these particulars?

English's testimony is much the same. He is one of those who were engaged in salvaging the hotel, and I say to you that there is nothing improbable or unreasonable in that. He says Gordon, Smith, Hannah and Henderson came there about the fifteenth of March, and asked the defendant and English to furnish them with a drink. The defendant said he had nothing, and that then one of these men produced the bottle and passed it around, and they all drank. He then says, English does, that he infers one of these men who came in there produced the bottle, because when it was going around, he had not seen the defendant get up out of his chair, so he infers the defendant did not get it anyway, and one of these men had it.

Mrs. Drake testifies to being there on one occasion with some eggs, to borrow some money. There was nothing said while she was there about whiskey or liquor; she [105] didn't see any or get any. You remember Gordon and Hannah said she was there, and that she had taken a drink, and that one of them had paid for the drink, or his round, as they called it, and that the defendant had furnished the liquor. She also was asked on cross-examination, in order to demonstrate her interest in this case, if she had not sold any liquor, and if the defendant was not to be a witness for her in a later case in which she was to be a defendant, and she said that she had not sold any, as I recollect it. She answered that she is

to be tried, and that the defendant is, as she expects, to be a witness for her. It is a question for the jury to determine whether it is a case between the defendant and this witness of "You scratch my back, and I'll scratch yours." The Court doesn't say so, or doesn't intimate so; but she is a witness for the defendant, and she expects that he is to be a witness for her. You have a right to ask yourselves whether that does not incline her to favor him with her testimony in the hopes that he will favor her.

Drinkert testified also to being there and working on the salvaging of the hotel; that he was in the house when Gordon, Hannah and Henderson came there; perhaps he said Smith also; that they wanted to buy a drink, and that the defendant said he didn't have any there. He says that one of those who came pulled out a bottle, or he saw a bottle pulled out, and that it was moonshine, and that he saw the defendant given no money or receive no money, and that they asked the defendant if they could sell him some moonshine; that Henderson had a still out in the country, and that the defendant said no, he wouldn't buy any. Drinkert assumes to identify the three witnesses as they [106] stood up in the rear of the court room, Gordon, Henderson and Hannah. He told us that he was there two nights; that these men all came back the next night, and he says that they again wanted to buy a drink, but that there was none sold in there; and that there was some talk about a bootlegger who had been tried and gotten away, which I cannot see any particular significance in; perhaps you can.



In rebuttal, the prosecution produced Henderson. They had a right to produce him in rebuttal. He testifies to much the same matter as Gordon and Hannah, except that he also testifies to being there much more frequently; he being in the employ of the state from the second to the nineteenth. I want you to observe this, in the matter of the testimony of Henderson in rebuttal: it, of itself, does not tend to prove, or is not evidence that the defendant sold anything primarily; it only goes to offset and neutralize, if, in your judgment, it succeeds in that purpose, the testimony of the defendant that he did not sell any liquor. That is to say, it is only to rebut the defendant's testimony. You might be of the view that, on the testimony of the prosecution, including Gordon, Hannah and the others, a case had been made against the defendant, but after you heard the defendant's testimony, as the case then stood, you might say that the defendant's evidence was sufficient to raise a reasonable doubt of his guilt. Then, if you find in the evidence of the witness Henderson enough to destroy the reasonable doubt of the defendant's testimony, that is the office of the testimony of Henderson, and none other. Henderson tells you that he was there with these men; that the defendant sold them liquor at that time; that he once saw the defendant get it out of the [107] cupboard in the rear room—and you will remember that the defendant testified that he did not then know the contents of that cupboard—and once from the other room. Henderson says he never offered to sell any liquor to the defendant; Gordon says he never offered to sell



any to the defendant. Henderson says that he had no moonshine or any still. Hannah says that he never offered to sell any liquor to the defendant. But in the trunk of the defendant, in the front room of that house, there we have the liquor, according to his own admission—ten or twelve quarts of it, I believe he said. Henderson and Gordon say that the colored woman, Mrs. Drake, sold them liquor when they went over to her house to have her make them dinner.

Now, gentlemen of the jury, that is the evidence; that is the case for you. It is for you to review the facts and circumstances, to take the evidence and weigh it, and to determine where the truth lies, in your judgment, and to render a verdict accordingly. If your judgment is that the defendant is proven guilty after you have reviewed the evidence, beyond a reasonable doubt, it is your duty to convict him; if, on the other hand, you believe that he is not so proven guilty, it is your duty to acquit him.

When you retire to your jury-room, you should proceed by selecting one of your number foreman, and when you agree, he should sign your verdict.

It takes all twelve of your number to agree upon any verdict in this case. Any exceptions?

Mr. MURPHY.—If your Honor please, the defendant desires to except to that portion of your Honor's instructions in which you commented upon the Volstead Law, and particularly that portion in which you state that that law is being violated more than any other law now is. Defendant further [108] desires to except to your Honor's comments on the

Volstead Law to the effect that violations of it are breaking down the morale of the people and the general observance of law, and that there is a spirit not to enforce that law. We further except to that portion of your charge wherein you comment upon the fact and mention the fact that Vic Smith was the agent of the defendant, because I do not believe the same was warranted or justified by the evidence.

The COURT.—I don't know whether you misapprehended my statement. Gentlemen of the jury, the Court has not told you that Smith was the agent of the defendant; that was not the intention of the Court. I say that it is an inference you may ask yourselves whether it is not proper to draw, in view of all the circumstances disclosed in the case. Counsel's exception to the instructions given will stand overruled, and an exception will be noted.

Whereupon bailiffs were sworn to take charge of the jury, and the jury retired to deliberate upon their verdict. [109]

Thereupon the jury retired to consider their verdict and thereafter on the said 12th day of July, 1921, returned into court with their verdict, which was duly received and filed herein.

Thereafter, upon motion of counsel for defendant, the Court, for good cause shown, granted defendant ten days in addition to the time allowed by law in which to prepare and serve his bill of exceptions herein.

Wherefore said defendant now presents the foregoing as and for his bill of exceptions herein and respectfully moves the Court that the same may be

settled, signed and allowed by the Court as a bill of exceptions of the evidence, introduced on the trial of said cause, and the objections and exceptions to said evidence, the instructions of the Court to the jury and the defendant's objections and exceptions to said instructions.

To Hon. John L. Slattery, United States Attorney  
for the District of Montana:

Please take notice that the foregoing is the bill of exceptions of the defendant, J. W. Willis, in the above-entitled action, proposed and submitted by said defendant.

LESTER LOBLE,  
McINTIRE & MURPHY,  
Attorneys for Defendant. [110]

Service of the foregoing bill of exceptions and receipt of a copy thereof this 1st day of August, 1921, is hereby admitted and acknowledged.

JOHN L. SLATTERY,  
United States Attorney for the District of Montana.

RONALD HIGGINS,  
Assistant U. S. Attorney for the District of Montana.

**Certificate of Judge to Bill of Exceptions.**

The foregoing bill of exceptions, having been duly served and presented for settlement within the time allowed by law and the order of this Court extending the time therefor, the same is hereby settled, allowed, approved and signed and certified as true and correct and contains in substance all of the evidence intro-

duced on the trial of said cause, together with the objections to the admission of such testimony, the rulings of the Court thereon and the exceptions of counsel thereto, together with the instructions of the Court as given to the jury and the exceptions taken to said instructions by defendant, and the same is hereby ordered entered in said cause as a part of the record thereof.

Dated this 11th day of August, 1921.

BOURQUIN.

Judge United States District Court for the District  
of Montana.

Filed August 11, 1921. C. R. Garlow, Clerk.  
[111]

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Thereafter, on August 1, 1921, praecipe for transcript of record was filed herein, in the words and figures following, to wit:

In the District Court of the United States, for the  
District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. W. WILLIS,

Defendant.

**Praecipe for Transcript of Record.**

To C. R. Garlow, Clerk of the Above-entitled Court:

You will please make up the transcript on writ of error of the above-named defendant and plaintiff in

error herein taking care that the same is a true and complete record, containing in itself and not by reference all papers and other proceedings which are necessary to the hearing in the United States Circuit Court of Appeals for the Ninth Circuit, and to that end including therein:

1. The judgment-roll in the above-entitled cause, including the information, clerk's minute entry of the defendant's arraignment and plea; minutes of the court during the trial of said cause; the verdict of the jury; the judgment.

2. Bill of exceptions.

3. Petition for writ of error.

4. Assignment of errors.

5. Order allowing writ of error.

6. Bond of defendant.

7. Writ of error.

8. Citation on writ of error.

9. Answer of court to writ of error.

10. Clerk's certificate.

And all other papers and documents necessary to a complete [112] record in said writ of error.

Dated this 30th day of July, 1921.

LESTER H. LOBLE,

McINTIRE & MURPHY,

Attorneys for Defendant.

Due service of within praecipe and receipt of copy thereof this 1st day of August, 1921, is hereby admitted and acknowledged.

JOHN L. SLATTERY,

U. S. Attorney, District of Montana,



Filed August 1st, 1921. C. R. Garlow, Clerk.  
[113]

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 114 pages, numbered consecutively from 1 to 114 inclusive, is a full, true and correct transcript of the record and all proceedings had in said cause required to be incorporated in the record on appeal therein by the praecipe of the plaintiff in error, and of the whole thereof, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation and writ of error issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Forty-eight & 05/100 Dollars (\$48.05), and have been paid by the plaintiff in error.

In witness whereof, I have hereunto set my hand

and affixed the seal of said court, at Helena, Montana, this 18th day of August, A. D. 1921.

[Seal]

C. R. GARLOW,

Clerk.

By H. H. Walker,

Deputy. [114]

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[Endorsed]: No. 3755. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Willis, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed August 22, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.



IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

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J. W. WILLIS,

*Plaintiff in Error,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant in Error.*

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**BRIEF OF PLAINTIFF IN ERROR**

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE DIS-  
TRICT OF MONTANA.

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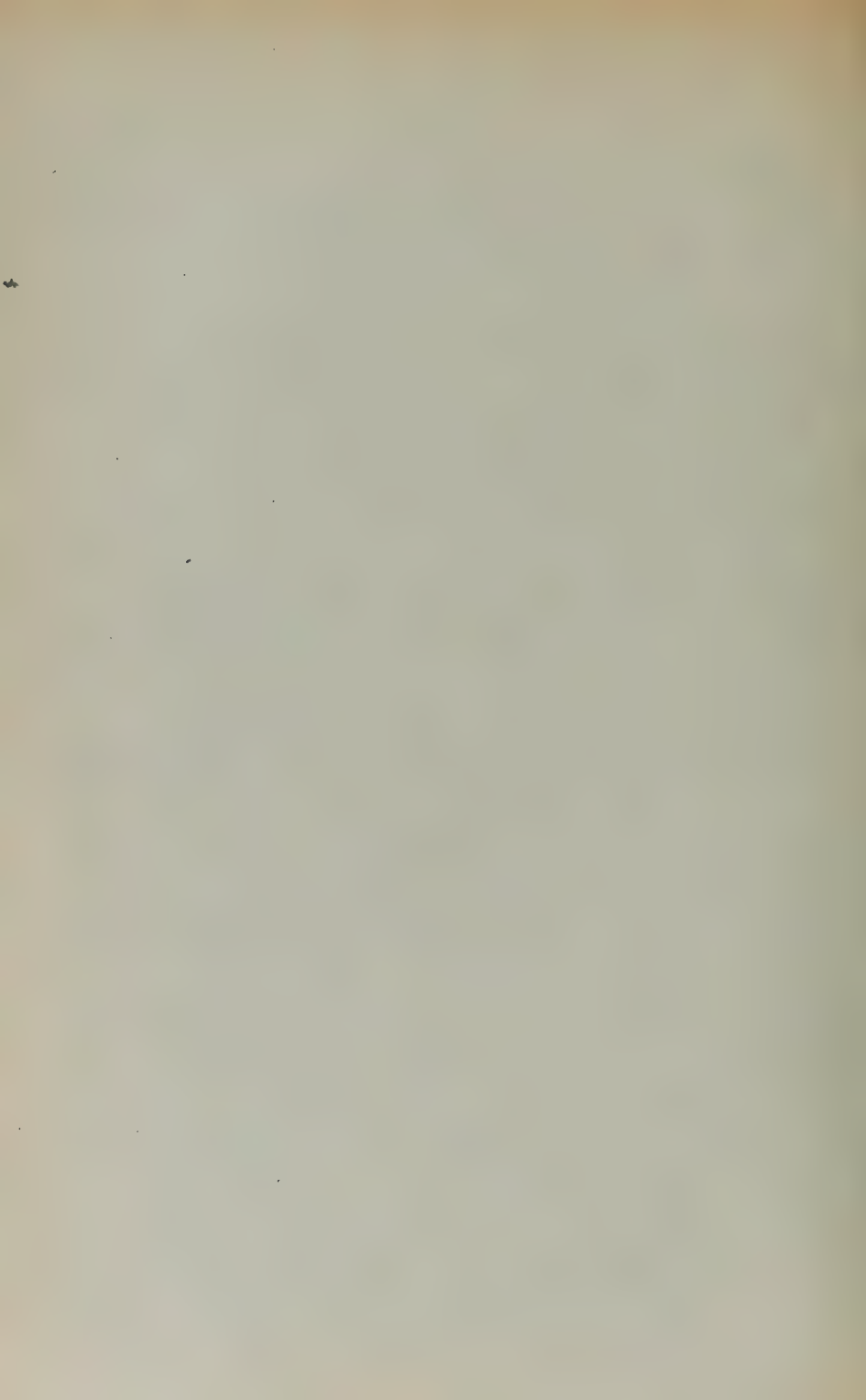
LESTER H. LOBLE,

McINTIRE & MURPHY,

*Attorneys for Plaintiff in Error.*

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FILED  
SEP 4 6 1921





No. 3755.

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IN THE  
United States Circuit Court of Appeals  
FOR THE NINTH CIRCUIT.

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J. W. WILLIS,

*Plaintiff in Error,*

*vs.*

UNITED STATES OF AMERICA,

*Defendant in Error.*

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BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE DIS-  
TRICT OF MONTANA.

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## STATEMENT OF THE CASE.

Plaintiff in error was accused in the District Court of the United States for the District of Montana, by information charging him with maintaining a common nuisance at Miles City, Montana, on the 19th day of March, 1921, said place being one where intoxicating liquor was kept and sold in violation of the National Prohibition Act (Trans. p. 133); to this information plaintiff in error entered a plea of not guilty (Trans. p. 141) and the case came on for trial before the court and a jury; after the evidence was received the court charged the jury and it retired to consider the case, and thereafter returned a verdict of guilty (Trans. p. 156), and judgment was entered against plaintiff in error upon such verdict (Trans. p. 172).

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## SPECIFICATIONS OF ERROR.

### I.

That the evidence in said cause is not sufficient as a matter of law to warrant the verdict of the jury or the judgment of the court against this defendant.

### II.

That there is no substantial evidence in said cause upon which to base the verdict of the jury or the judgment of the court as to this defendant.

### III.

The court erred in over-ruling defendant's objection to the testimony of the witness Berl Henderson given in rebuttal on the trial of said cause.

### IV.

The court erred in denying defendant's motion to strike the testimony of the witness Henderson given in rebuttal on the trial of said cause.

### V.

The court erred in giving to the jury that part of its instructions which is as follows, to-wit:

“In respect to the law involved in this case, the famous Volstead Act, passed by Congress to carry out the provision for National Prohibition, it is a Constitutional amendment, and it is just as much a law as any other law upon our statutes. We all know that no law ever written is being violated or has been violated to a greater degree than the Volstead Law is now; but that is only the more reason why it must be enforced, as long as it is the law, with diligence and faithfulness, so that this tendency to violate this law may not, as it inevitably will if its violations are condoned or permitted to continue unpunished, tend to encourage the violation of other laws; because, when people discover that one law may be violated with impunity, that courts and juries are

impotent to enforce the law, there is a general tendency to transgress other laws, a failure to give due observance to law, and as a result, a breaking down of the morale. In other words, if a man may break the law and escape the consequences of his act, people say, 'What is the use? If one set of men can violate one law and escape, what is the use of the rest of us observing any law?' So it leads to the violation of other laws, and a breakdown of the morale of the people. Another thing in reference to this Volstead Act: People comment upon the fact that with many people it is not a popular law; many people are opposed to its spirit. They argue about this way,—that if they are drawn in the jury box in a case involving a prosecution for the violation of its provisions, they will return a verdict of acquittal; that they are against the spirit and operation of the law; that it is not right, so they will fail to enforce the law, and will permit the offender to escape. They argue to themselves further: 'If I am accused of a violation of this law it will only be necessary for me to swear to any sort of fictitious defense to give the jury a plausible excuse in order to secure my acquittal.'

"Gentlemen of the jury, that is a thing that wants to be suppressed as not well founded. I will say that in the Federal Court I have not found it to have any basis of truth, so far as

juries are concerned. Of cases that have come up in this Court, there have been as many convictions that were merited under this law, as in any other case. Why do I say this to you? Not to say that this defendant is to be convicted; not at all. I merely wish to impress upon you the seriousness of your duty in every one of these cases as in any other question that may be brought before you, and that you give to it the same serious, thoughtful and honest consideration; that you execute and carry out your duty, your obligation and your oath, whatever the verdict may be."

to which portion of said instructions the defendant made the following objections and exceptions, to-wit:

"MR. MURPHY If your honor please, the defendant desires to except to that portion of your honor's instructions in which you commented upon the Volstead law, and particularly that portion in which you state that that law is being violated more than any other law now is. Defendant further desires to except to your honor's comments on the Volstead Law to the effect that violations of it are breaking down the morale of the people and the general observance of law, and that there is a spirit not to enforce that law."

## VI.

The court erred in over-ruling defendant's objection and exception to that portion of its charge to the



jury which is set forth at length in Specifications of Error numbered 5 herein.

## VII.

The court erred in giving to the jury that part of its instructions which are as follows, to-wit:

“Ask yourselves this: Whether Smith, who took them there and introduced Henderson and the others to the defendant in the first place, whether or not Smith was the agent of the defendant. Ask yourselves how these officers would find their way there if they were not taken there by someone who knew the liquor was there. Why did the defendant tolerate these men around there unless they were customers, whose patronage, at fifty cents a drink, was a profitable one.”

to which portion of said instruction defendant made the following exceptions, to-wit:

“We further except to that portion of your charge wherein you comment upon the fact and mention the fact that Vic Smith was the agent of the defendant, because I do not believe the same was warranted or justified by the evidence.”

## VIII.

The court erred in over-ruling defendant's exceptions and objections to that portion of its charge to the jury which is set forth in Specifications of Error numbered 7 herein.

IX.

The court erred in rendering and entering judgment herein for the reason that there is not sufficient evidence herein to justify or sustain said judgment.

X.

The court erred in rendering and entering the judgment herein for the reason that there is no evidence to justify or sustain the verdict of the jury.

XI.

The court erred in rendering and entering judgment herein for the reason that the verdict herein is contrary to law.

XII.

The court erred in rendering and entering judgment herein for the reason that the same is contrary to law.

XIII.

The court erred in rendering and entering judgment herein against defendant.

## ARGUMENT.

Specifications of Error V and VI, as to error in instructions given and excepted to by plaintiff in error may properly be considered together.

Plaintiff in error submits that it was error for the trial court to so instruct the jury concerning the Volstead Act. A most careful reading of the record fails to disclose a scintilla of evidence before the court as to whether or not the Volstead Law was being violated to any degree more than any other law or that a failure to enforce the Volstead Law would break down the morale of the people, or that said law was not popular with many people, or many people were opposed to its spirit, or that any defendant or person considered he only had to swear to a fictitious defense to give the jury a plausible excuse to acquit.

Such a charge as the one herein complained of did not tend to aid the jury in arriving at a conclusion after a calm and dispassionate consideration of the case, but was what can more properly be designated as a defense of the National Prohibition Laws and a review of supposed difficulties of enforcement, and could not but have impressed the jury with the fact that the law had been flagrantly violated and its future efficacy depended upon convictions in that court. Thus placing this defendant not in the position of one charged with an offense but in a class of persons whose convictions must be had not so much because

of their violations of law, but in order to uphold that particular law in public esteem. In effect under such an instruction persons charged with violations of the National Prohibition Act were singled out and the jury urged to convict such malefactors because the court believed the law unpopular, and persons on trial for such alleged offenses were deemed to be *sui generis*.

If there was any evidence at all to justify such an instruction as the trial judge gave we would not complain, but it is as similar a case as one can be with that of *Starr vs. U. S.*, 153 U. S. 614.

The Circuit Court of Appeals for the Ninth Circuit in the case of *Dolan vs. United States*, 123 Fed. Rep. at page 54, 55 held:

“In 11 Encyc. Pl. & Pr. 128, it is said that ‘it is error for the court, in instructing the jury to assume the existence of facts in support of which there is no evidence. This constitutes a direct perversion of the testimony upon which alone the jury are to render their verdict. The court, as well as the jury, is to consider only the testimony offered in court.’

“See, also, the numerous authorities there cited, including *Jones vs. Randolph*, 104 U. S. 108, 26 L. Ed. 671; *Davis vs. Patrick*, 122 U. S. 138, 7 Sup. Ct. 1102, 30 L. Ed. 1090; *People vs. Matthia*, 135 Cal. 442, 448, 67 Pac. 694.

“The giving of this instruction, in the light of all the circumstances disclosed by the record, was evidently prejudicial to the substantial rights of the defendant, and is of itself sufficient to authorize a new trial.”

In the case just cited the instruction was not predicated upon any evidence before the court.

It is further contended that the charge above quoted given by the court to the jury was highly prejudicial for the reason that it was calculated to inspire the jury to bring in a verdict of guilty against the defendant in order that the Volstead Law should be upheld and without regard to the evidence against defendant. It was further calculated to so incite the minds of the jury that they would be constrained to return a verdict of guilty so that it would not be imputed that the Volstead Law was unpopular with them, or any of them. It urged upon the jury to uphold this law and enforce it so that the morale of the people would not be broken down and intimated that persons argue to themselves that a fictitious defense would give a jury an excuse to acquit. Although not saying that there was a fictitious defense in this case, still leaving an inference to be drawn by the jury that they could look upon this as a fictitious defense so generally set forth on the trial of cases for the violation of this law. All of this charge complained of was such as to interfere with the right and duty of the jury to exercise an independent judgment in the premises and



to arrive at a determination solely upon the facts in the case and this influence upon the minds of the jury was not corrected when the court instructed that it did not say the defendant was to be convicted.

We submit the whole charge cannot but be said to have a tendency to impress on the minds of the jurors that this was a fictitious defense to evade the penalties of the "famous Volstead Act" for the judge by innuendo and comment belittled the testimony of the defendant and his witnesses—for he refers to the sale of whiskey at fifty cents a drink as being a profitable trade (Trans. p. 112<sup>12</sup>), and as to the witness Lizzie Drake he said her testimony should be viewed by the jury with care, and it was "a question for the jury to determine whether it is a case of the defendant (Willis) and this witness (Lizzie Drake) "you scratch my back and I'll scratch yours," merely because she thought Willis would subsequently be a witness for her (Trans. p. 115). Such comments by a judge are almost equal to evidence, in fact the respect and deference properly accorded to our courts makes the average juror very susceptible to the remarks of a judge and thus a defendant is prevented from having a determination of his case made upon the evidence. Without evidence of guilt no proper verdict of guilty can ever be reached in a case and suspicions in a case that a defendant is guilty does not justify a conviction. How much less then can suspicions of a trial judge that violators of the Volstead Act put up

fictitious defenses justify a jury in rendering a verdict of guilty.

In the case of *Starr vs. United States*, 153 U. S. page 614-626, the Supreme Court in passing upon the charge to a jury fully reviews the right of the trial judge in instructing the jury and in passing upon a charge given in that case the court says:

“So the Supreme Court of Pennsylvania says: ‘When there is sufficient evidence upon a given point to go to the jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead, and especially that it should not be one-sided. The evidence, if stated at all, should be stated accurately, as well that which makes in favor of a party as that which makes against him; deductions and theories not warranted by the evidence should be studiously avoided. They can hardly fail to mislead the jury and work injustice.’” *Burke vs. Maxwell*, 81 Penn. St. 139, 153. See also 2 Thompson on Trials, Art. 2293, 2294, and cases cited.

It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received

with deference, and may prove controlling. *Hicks vs. United States*, 150 U. S. 442, 452. The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree, and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independent judgment in the premises, or with the circumspection and caution which should characterize judicial utterances.

In addition to what has already been quoted, the following remarks, among others, were made:

“How unjust, how cruel, what a mockery, what a sham, what a bloody crime it would be upon the part of this government to send a man out into that Golgotha to officers, and command them in the solemn name of the President of the United States to execute these processes, and say to them, Men may defy you; men may arm themselves and hold you at bay; they may obstruct your progress; they may intimidate your execution of it; they may hinder you in making the arrest; they may delay you in doing it by threats of armed violence upon you, and yet I am unable as chief executive of this government to assure you that you have any protection whatever.”

\* \* \* “What was this posse to do? What was he commanded to do? To go into the Indian country and hunt up Mr. Starr, and say to him

that on a certain day the judge of the Federal Court at Fort Smith will want your attendance at a little trial down there wherein you are charged with horse stealing, and you will be kind enough, sir, to put in your attendance on that day; and the judge sends his compliments to you, Mr. Starr. Is that his mission? Is that the message from this court that is to be handed to Mr. Starr upon a silver platter with all the formalities of polite society? Is that what Floyd Wilson was employed or engaged to do? No. This court did not have anything to do with that command; it does not go in the name of this court; it goes in the name of the chief executive officer, the President of the United States. What does he say, of course acting for the people?"

\* \* \* "Without these officers what is the use of this court? It takes men who are brave to uphold the law here. I say, because of this, and because there is no protection unless the law is upheld by men of this kind, if it be true that you are satisfied of the fact beyond a reasonable doubt that Floyd Wilson was a man of this kind, that he was properly in the execution of the high duty devolving upon him, and while so properly executing it by the light of these principles of the law I have given you, his life was taken by this defendant, your solemn duty would be to say that he is guilty of the crime of murder, because if the law has been violated it is to be vindicated; you

are to stand by the nation; you are to say to all the people that no man can trample upon the law wickedly, violently, and ruthlessly; that it must be upheld if it has been violated.”

These expressions are qualified to some extent by other parts of the charge, which we cannot give at length, but we are constrained to express our disapprobation of this mode of instructing and advising a jury.

Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which and the manner in which the administration of justice should be conducted are the same everywhere, and argumentative matter of this sort should not be thrown into the scales by the judicial officer who holds them.”

We contend that in the case at bar that portion of the instructions heretofore quoted is objectionable and a new trial should be granted by reason of such instruction.

The case of *Starr vs. United States* has been cited with approval many times. See

*Mullen vs. United States*, 106 Fed. 895.

*Nichols vs. United States*, 106 Fed. 677.

*Hickory vs. United States*, 160 U. S. 408.

*Al lison vs. United States*, 160 U. S. 217.

*Sparf vs. United States*, 156 U. S. 50-179.



Foster vs. United States, 188 Fed. 305-308.

Ching vs. United States, 118 Fed. 542.

Mutual Life Ins. Co. vs. Logan, 87 Fed. 647.

U. F. Ins. Co. vs. Thomas, 82 Fed. 406-410.

In the case last cited, the same being a civil action, the Starr case, *supra*, was cited with approval and quoted, the Circuit Court of Appeals of the Seventh Circuit after commenting upon the instruction, saying:

“It is sufficient to say upon the subject in general that every party in a court of justice is entitled to a fair and impartial trial of his cause, and that neither court nor counsel may rightfully use language in the presence and hearing of a jury which shall tend to excite passion or prejudice, or prevent calm, dispassionate consideration of the case. Reynolds vs. U. S. 98 U. S. 145, 168; Hicks vs. U. S. 150 U. S. 442, 452, 14 Sup. Ct. 144; Starr vs. U. S. 153 U. S. 614, 14 Sup. Ct. 919; Hickory vs. U. S. 160 U. S. 408, 425, 16 Sup. Ct. 327; Railway Co. vs. Meyers, 24 U. S. App. 295, 304, 11 C. C. A. 439, and 63 Fed. 793. The judgment is reversed, and the cause remanded, with directions to the court below to award a new trial.”

In the case of Rudd vs. United States, 173 Fed. 912, the Starr case has been cited with approval, the court saying:

“As Chief Justice Fuller said in Starr vs.

United States, 153 U. S. 614, 626, 14 Sup. Ct. 919, 38 L. Ed. 841, the influence of the trial judge on the jury is necessarily and properly of great weight, and his lightest word or intimation is received with deference and may be controlling. So positive and emphatic were the remarks of the court that it is not too much to say the jury may have believed a finding for the accused would have subjected them to ridicule. True, the court afterwards withdrew the language, and said that 'it does not follow that a man is a fool or insane who believes the representations,' and that it was a question for the jury; but it is doubtful the damage was repaired, and when that is the case the just remedy is a new trial. A mere withdrawal of words, and a direction to the jury that the question is for them, is not always sufficient. The effect of what was said may remain.

We do not mean to impair in any degree the right of a trial court in both civil and criminal cases to comment upon the facts, to express its opinion upon them, and to sum up the evidence, for that is one of the most valuable features of the practice in the courts of the United States. A Judge should not be a mere automatic oracle of the law, but a living participant in the trial, and so far as the limitations of his position permit should see that justice is done. But his comments upon the facts should be judicial and dis-

passionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment.”

And further, as to the question of the propriety of a trial judge giving to a jury an instruction that is coercive, for such is the effect of an instruction such as was given herein.

Peterson vs. United States (9 C. C. A.) 213  
Fed. 920, 925.

*See also: Johnson v. U.S. 270 Fed. 168*

It is respectfully submitted that the jury by reason of the charge herein complained of were not left free to consider the facts in this case dispassionately and the defendant is entitled to a new trial.

## I.

That portion of the charge embraced in Specifications of Error VII and VIII was also highly prejudicial, for it tells the jury to ask themselves if Smith was not an agent for Willis, that is an agent to stimulate the alleged business of selling liquor on the premises in question. The court intimating thereby that the business was so profitable that Willis had drummers out to secure trade, and if the jury believed that Smith was such an agent that could be considered against the defendant. Search the record as carefully as one may and one will find no word of testimony or intimation of any witness, not even hints that Smith was at

all connected with Willis. Nor was this error corrected by the court after the exception was taken to that part of the charge as the court still told the jury it could consider whether Smith was an agent for Willis, but he, the Court, didn't say Smith was (Trans. p. 123)! 17-8

That an instruction not based on the evidence in the case is erroneous is too elementary to need authorities cited in support thereof. The cases heretofore cited settle the question, especially

Starr vs. United States, 153 U. S. 614.

In conclusion we submit the judgment complained of should be reversed for the reasons above set forth.

LESTER H. LOBLE,  
McINTIRE & MURPHY.

*Attorneys for Plaintiff in Error.*





In the  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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J. W. WILLIS

Plaintiff in Error

VS.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED  
STATES DISTRICT COURT OF THE  
DISTRICT OF MONTANA.

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**Brief of Defendant in Error**

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JOHN L. SLATTERY,

United States Attorney.

RONALD HIGGINS,

Asst. U. S. Attorney.

WELLINGTON H. MEIGS,

Asst. U. S. Attorney.

Attorneys for Defendant in Error

FILED

OCT 3 - 1921



In the  
**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit**

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J. W. WILLIS,

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**Brief of Defendant in Error**

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I.

Of the thirteen errors specified by the Plaintiff in Error, only two, in effect, are adverted to in the argument in his brief, and these relate to excerpts from the instructions given by the Court. No exception was taken to that part of the instructions in which the Court referred to the "sale of whisky at fifty cents a drink as being a profitable trade," (Trans. p. ~~127~~ 8) (Ptf's. Brief 11) or to the Court's reference to the testimony or motive of Lizzie Drake,

a witness for the defendant. (Trans. p. 127-8) (Pts.'s. Brief. p. 11) Hence, under the familiar rule that alleged errors not excepted to will not be noticed on review, it is unnecessary to discuss the correctness or incorrectness of the Court's charge so far as those portions of it just referred to are concerned.

Two questions remain for argument:—first, Did the Court commit prejudicial error in giving to the jury that part of the instructions set forth in Specification of error No. V? (Ptf's. Brief, pp. 3, 4, & 5.)

Second, did the court commit prejudicial error in giving to the jury that part of its instructions set forth in Specification of Error No. VII? (Ptf's. Brief, p. 6.)

Before discussing these questions it is pertinent to observe that the plaintiff in error has singled out from a lengthy charge only two excerpts on which he predicates error. This manner of attacking the correctness of the instructions is not in accordance with the practice and decisions in federal courts. In the case of *Charles v. United States*, 213 Fed. 707 (C.C.A. 4th) it is said:

“It is well settled that a single sentence or even a lengthy paragraph in a charge cannot be treated as determining the correctness of the charge in its entirety; the proper method being to consider the charge as a whole, and if, when so considered, it appears that the court has clearly stated the law, a reversal will not be directed, even though it should appear that some portion of the same is subject to criticism,”

And,

Detached portions of the instructions should be read in connection with the other portions.

May v United States, 157 Fed. 1, 6. (C.C.A. 9th.)

See also Horn v. United States, 182 Fed. 721, 740, (C.C.A. 8th), wherein it is said:

“Excerpts from the charge standing by themselves and apart from the rest of it may be vulnerable to some of the criticisms urged against them; but that is not the proper test of the correctness of the charge. That must be considered as a whole. . . . .”

To the same effect are the following:

Colt v. United States, 190 Fed. 305, 308. (C.C. A. 8th).

LeMore et al v. United States, 253 Fed. 887. (C.C.A. 5th).

Peters v. United States, 94 Fed. 127; 36 C.C.A. 105.

## II

*Was it error for the Court to give that part of the instructions set forth in Specification of Error No. V?* Technically, of course, no evidence was introduced by which it could be determined whether or not “no law ever written is being violated or has been violated to a greater degree than the Volstead Law is now,” (and it is to be noted that the Court did not say that the Volstead Law “is being violated more than any other law now is,” according to the exception taken by the defend-



ant's counsel). (Trans. p~~127-8~~). It is clear that all that the Court said in that respect amounted to nothing more or less than a comment on a fact which is commonly known, for it is notorious that the courts in the United States, police, State, and Federal are constantly called upon to exercise jurisdiction in cases arising from the alleged violation of the National Prohibition Act; and that the Court was simply making a general comment, as above suggested, must have been so understood by the jury, for the court, out of an abundance of caution, lest the jury might consider that comment as an intimation from the court that they should find the defendant guilty, further charged the jury:

“Why do I say this to you? Not to say that this defendant is to be convicted; not at all. I merely wish to impress upon you the seriousness of your duty in every one of these cases as in any other question that may be brought before you, and that you give to it the same serious, thoughtful and honest consideration; that you execute and carry out your duty, your obligation and your oath, whatever the verdict may be.” (Trans. p. ~~111-112~~).

As a matter of fact, the evidence on behalf of the Government showed rather frequent violations of the Volstead Law on the part of the defendant himself. For instance, the witness Gordon testified that he purchased whisky of the defendant on the 10th, 11th, 12th, 14th, 16th, and 17th of March, 1921. (Trans. pp. ~~54-55~~), and during that period other persons were served with drinks in the defendant's house

by the defendant. (Trans. pp. 54-5-6).<sup>7</sup> This evidence, coupled with the facts in the common knowledge of all of us, rendered the comment entirely harmless.

Courts very properly have a wide latitude in commenting on the evidence and expressing opinions thereon. The rule is well laid down in the case of *Starr v. United States*, 153 U. S. 614, on which case the plaintiff in error mainly relies for a reversal of the judgment herein. In *Starr v. United States*, *supra*, the court in charging the jury misdirected them as to the law, and having become apparently highly indignant toward the defense, employed language which was so forceful and bitter that it could not have had any affect other than to arouse the passions and sympathy of the jury to the prejudice of the defendant. Such is not the case here. In the *Starr* case is found a very clear exposition of the law with respect to the province of the Court, as follows:

“It is true that in the Federal Courts the rule that obtains is similar to that in the English Courts, and the presiding Judge may, if in his discretion he thinks proper, sum up the facts to the jury; *and if no rule of law is incorrectly stated*, and the matters of fact are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the facts is not reviewable on error.”

*Rucker v. Wheeler*, 127 U. S. 85, 93. (32; 102, 105.)

*Lovejoy v. United States*, 128 U. S. 171, 173. (32; 389, 390.)

It is not asserted by the plaintiff in error that the Court incorrectly stated any rule of law or failed to ultimately submit all matters of fact to the determination of the Jury.

In *Lovejoy v. United States*, *supra*, Justice Gray said:

“It is established by repeated decisions that a Court of the United States in submitting a case to the Jury may, at its discretion, express its opinion upon the facts and that such an opinion is not reviewable on error, so long as no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the determination of the jury, . . . . .”

Cited with approval in *Simmons v. United States*, 142 U. S. 148.

Supporting the same rule are the following cases:

*Dunbar v. United States*, 156 U. S. 185.

*Wiborg v. United States*, 163 U. S. 632.

An examination of the instructions discloses that the Court was extremely careful to make it clear that the right and duty to determine the facts were peculiarly and exclusively within the province of the jury.

“. . . . but when it comes to the facts, and what the evidence proves, what witnesses you will believe, what weight you will give to the testimony, what logical inferences you will draw from the circumstances in the case—that is entirely for you to determine. Your responsibility begins there; you determine the facts for yourselves. The Court cannot tell you what the facts are, nor bind you

to its view of the facts as given by the witnesses who appear before you. Courts are privileged to comment upon the credibility of witnesses and upon the weight of the evidence, and upon what is proven and what is not proven, in the Court's judgment; but that is not in the hope to bind you, for it cannot, and the Court has no right to bind you by its comments; and when it is done, it is solely for the purpose and object of aiding you to reason the case out to a correct conclusion." (Trans. p. 108-9).

". . . . . your duty relates to the facts, and the Court's to the law. . . . . You are judges of the facts." (Trans. p. 109).

". . . . . You, the Jury, will weigh the evidence against him and the evidence for him to determine whether, in spite of the presumption of innocence, he is guilty as charged, beyond a reasonable doubt." (Trans. p. 113).

". . . . . and whether or not it is an ingenuous defense or a truthful one is entirely for the jury to determine." (Trans. p. 121).

". . . . . On occasion there will be men who will swear to anything for both plaintiff and defendant, and it is for you to determine which of them is telling the truth. That is what you are here for—to penetrate these evasions and contradictions and arrive at the truth, in order to execute the law, whether it is a verdict of guilty or acquittal which you find; because a verdict of acquittal executes the law just as much as a verdict of guilty." (Trans. p. 123).

". . . . . It is for you to review the facts and circumstances, to take the evidence and weigh it, and to determine where the truth lies, in your judgment, and to render a verdict accordingly. If your judgment is that the defendant is proven guilty after you have reviewed the evidence, beyond a

reasonable doubt, it is your duty to convict him; if, on the other hand, you believe that he is not guilty, it is your duty to acquit him.”

(Trans. p. 127)

“I don’t know whether you misapprehended my statement. Gentlemen of the jury, the Court has not told you that Smith was the agent of the defendant; that was not the intention of the Court. I say that it is an inference you may ask yourselves whether it is not proper to draw, in view of all the circumstances disclosed in the case.” (Trans. p. 128)

Certainly, the jury could not but understand that theirs was the absolute right to determine what was proved and what was not proved by the evidence, irrespective of any comment of the Court, and that all of the facts were left for their determination, and thus, the instruction is clearly within the rule laid down in *Lovejoy v. United States*, *supra*, and *Starr v. United States*, *supra*, so frequently cited with approval, and is likewise within the limitations prescribed in the decision of *Shea et al v. United States*, 251 Fed. 440, 445, (CCA 6th), from which we quote.

“The trial court is alleged to have invaded the province of the jury, first, by instructing in effect that the so-called “turf exchange” was a sham and a fraud, the requested instruction that such alleged fact must be proved beyond a reasonable doubt not being in terms given; and, second, in that the charge as a whole was unduly argumentative in favor of the prosecution. The rule is well settled in the federal courts that the trial judge has the right to express his opinion upon the facts of the case and to advise the jury re-



garding their conclusions thereon, provided the jury is given to unequivocally understand that it is not bound by the judge's expressed opinion. *Simmons v. United States*, 142 U. S. 148, 155, 12 Sup. Ct. 171, 35 L. Ed. 968; *Allias v. United States*, 155 U. S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91; *Young v. Corrigan* (C. C. A. 6) 210 Fed. 442, 127 C. C. A. 174. This general rule is subject to the limitation that his comments upon the facts should be 'judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment.' *Rudd v. United States* (C.C.A. 8) 173 Fed. 912, 914, 97 C. C. A. 462; *Sandals v. United States*, (C. C. A. 6) 213 Fed. 569, 576, 130 C. C. A. 149.

The important question is whether the Court went beyond a proper exercise of his functions. In discussing the evidence of the existence of the alleged scheme to defraud the trial judge used the language which we quote in the margin. (3) Plaintiffs in error specially criticise the portions we have italicized. Obviously, the criticized extract must be considered in connection, not only with its context, but with the entire charge. The Court had already told the jury that it was its business 'to decide the facts, regardless of what it may assume to be the impressions of the judge.' Several times afterwards the jury was expressly told that it was the sole judge of the facts, including these statements:

'If your opinion upon the questions upon which the Court has ventured an opinion, namely, that a scheme to defraud was in operation, which was substantially of the character charged in the indictment, and that the mails were misused to promote such a scheme, without reference to the identity of the parties interested, differs from that entertained by the Court, your duty is to ad-

here to your own opinion, and not allow that of the Court to have any influence whatever upon your conclusion.'

It is true that the Court did express his opinion that no reasonable man could question that the so-called turf exchange was a pretense and a sham. This proposition, under the evidence in the case, was not reasonably open to question. There was uncontradicted and competent testimony which could reasonably mean only that neither the telephone nor telegraph instruments connected anywhere. The only reasonable inference from the testimony was that the charts, racing forms, etc., were shams. In view of the Court's charge, taken as a whole, including the express instructions regarding the presumption of innocence and the necessity of proving the various elements of the charge beyond a reasonable doubt, we find no prejudicial error, if indeed, there is any, in the failure to give the request we have referred to. While the charge of the Court was argumentative, in the sense that it contained a considerable discussion of the testimony, which was applied to the various elements of the offense charged, we are not impressed that it was unduly so, or that it went beyond the limitations upon the trial judge's right of comment as previously expressed in this paragraph."

(3) The marginal quotation above referred to, is as follows:

"There is little chance for dispute here, in the Court's opinion, but that the paraphernalia employed to impress Hoblitzel with the thought that he was in touch with a real turf exchange, so called, where real wagers on the outcome of real horse races might be laid, were but the furniture of this swindle. The large amount of ap-

parent money was but a simulation, the telegraph and telephone instruments were but shams, in that neither was a real instrument of communication; the announcements and posting of races were shams, the bookings were tricks. Anyone who devised this scheme produced just such a fraudulent device as the statute condemns."

It is contended by plaintiff in error that the portion of the charge quoted in specification of Error No. V, was "highly prejudicial for the reason that it was calculated to inspire the jury to bring in a verdict of guilty against the defendant in order that the Volstead Law should be upheld and without regard to the evidence against defendant," and that "it was further calculated to so incite the minds of the jury that they would be constrained to return a verdict of guilty so that it would not be imputed that the Volstead Law was unpopular with them, or any of them. (Ptf's Brief, p. 10.)

This contention is not supported by the decisions. Even if the Court had told the jury that he believed the defendant was guilty, it would not have been error provided, the ultimate determination of the facts was left to the jury.

In the case of *Morse v. United States*, 255 Fed. 681, (C. C. A. 4th), the District Judge expressed his opinion of the defendant's guilt in the following language:

"You are the sole judges of the facts of the case, and should determine the same after due

consideration of all the evidence, in the light of attending circumstances, and the reasonable and fair inferences to be drawn from the testimony, and in so doing you should act upon your own independent judgment, uninfluenced by what others, including the Court, may think or say. But I would be derelict in my duty if I did not say to you that, from my standpoint and viewpoint, this testimony irresistibly and irrefutably points to the absolute guilt of these defendants."

And, the appellate Court, speaking through Woods, Circuit Judge, said:

"The opinion that the accused was guilty was strongly expressed, but the expression was accompanied by an equally strong statement that the jury should exercise their own independent judgment in coming to a verdict uninfluenced by the opinion of the judge. Since the ultimate conclusion was left to the jury, there was no error in the instruction. *United States v. Philadelphia & Reading R. R. Co.*, 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138; *Simmons v. United States*, 142 U. S. 148, 12 Sup. Ct. 171, 35 L. Ed. 968; *Doyle v. Union Pacific Ry. Co.*, 147 U. S. 413-430, 13. Sup. Ct. 333, 37 L. Ed. 223; *Allias v. United States*, 155 U. S. 117, 15 Sup. Ct. 36, 39 L. Ed. 91.

*Breeze v. United States*, 108 Fed. 804, 48 C. C. A. 36, relied on by defendant, seems to be inconsistent with the doctrine laid down by the Supreme Court in the cases cited. If that case can be sustained at all as a precedent, it is on the narrow distinction that the District Judge, although clearly charging the jury that they were not bound by his opinion, and should exercise their independent judgment, yet used the words, "that in his opinion it was the duty of the jury to convict the defendant." Here the jury were



not told that it was their duty to convict, or that they ought to convict.”

In *Endleman v. United States*, 86 Fed. 456 (CCA 9th) the following extract from the opinion by Morrow, Circuit Judge, is pertinent:

“In charging the jury, the Court said:

‘The federal courts allow the judges sometimes to give an opinion on the evidence. I gave my judgment to the other jury, and I will give it to you. I do not see any way that these defendants can be acquitted. Notwithstanding, I charge you that you are the judges of the evidence, and from that evidence, it is for you to say whether or not they, or either of them, are guilty.’

It is objected that the Court had no right to express an opinion as to the guilt or innocence of the defendant. The language used by the court, as to the guilt of the defendant, is certainly not to be commended. While it is true that the federal judges have the right, in criminal cases, to express to the jury their opinion as to the guilt or innocence of one accused of crime and on trial, and advise them as to the facts of the case, still the supreme court has repeatedly admonished the trial courts that this should be done with great care and circumspection.

In the case of *Starr v. U. S.*, 153 U. S. 614, 627, 14 Sup. Ct. 919, 924, the supreme court, in expressing in unmistakable terms its disapprobation of the language used by the trial judge in his charge to the jury, said:

‘Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which and the manner in which the administration of justice should be conducted are the same every-



where, and argumentative matter . . . . should not be thrown into the scales by the judicial officer who holds them.'

While the remarks of the learned judge are subject to criticism, and we are compelled to express our disapproval of it, still as no rule of law was incorrectly stated to the jury, and the matters of fact were ultimately submitted to the determination of the jury, we do not consider that it was reversible error. *Rucker v. Wheeler*, 127 U. S. 85, 93, 8 Sup. Ct. 1142; *Lovejoy v. U. S.*, 128 U. S. 171, 173, 9 Sup. Ct. 57.

The other errors assigned are so obviously without merit as not to require discussion. The judgment of the district court is affirmed."

Again, in *Savage v. United States*, 270 Fed. 14, (C.C.A. 8) the court told the jury that in its opinion the defendant was guilty on some of the counts of the indictment, and in the opinion the appellate court said:

"Complaint is made of a portion of the instructions expressing the Court's opinion as to the guilt of the defendant founded upon a general exception to 'the remarks of the court concerning the guilt or innocence of the defendant.' The court said that, as to four transactions which were named and described, there could not be any doubt that a fraud was perpetrated, but left it to the jury to find who had perpetrated the frauds. The court further said that it was of the opinion that the defendant was guilty on all counts but 4 and refused to express an opinion as to the defendant's guilt as to those 4. The court stated repeatedly that this was a mere expression of its opinion, and that the jury were not bound by it, and that it was the jury's duty to follow its own judgment, and that, if the jury

were of a contrary opinion, it was its duty to disregard the court's opinion. In the courts of the United States the judge may state to the jury his opinion upon the evidence, provided they are left free to determine the facts. *Allias v. United States*, 155 U. S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91; *Horning v. District of Columbia* (decided Nov. 22, 1920), 254 U. S. 135, 41 Sup. Ct. 53, 65 L. Ed.—; *Aerheart v. St. Louis, I. M. & S. Ry. Co.*, 99 Fed. 907, 909, 40 C. C. A. 171; *Smith v. United States*, 157 Fed. 721, 732, 85 C. C. A. 353; *Keller v. United States*, 168 Fed. 697, 698, 94. C. C. A. 368."

### III

Did the Court commit error in giving to the jury that part of the instructions set forth in Specification of Error No. VII? This question is practically disposed of by what is said with respect to Specification of Error No. V.

The assignment ought not to be noticed because the language of the Court does not support the exception, for the exception was "to that portion of your charge wherein you comment upon the fact and mention the fact that Vic Smith was the agent of the defendant, because I do not believe the same was warranted or justified by the evidence," (trans. p. 128). What the Court did say to the jury was that they should ask themselves whether or not Smith was an agent of the defendant. (Trans. p. 121) There is a vast difference between what counsel says the Court said and what the Court actually did say; the difference between the positive assertion of a fact and a direc-

tion to inquire as to whether or not such a fact existed.

In the case of *Sylvia v. United States*, 264 Fed. 59, (C. C. A. 6) the defendant was convicted for carrying on the business of a retail liquor dealer without having paid the tax required by law. Exceptions were saved to the instructions of the Court and the following language, taken from the decision is clearly in point.

"In discussing certain features of the evidence pro and con, the court said:

'The point is, Was he furnishing whisky and taking money for it under such circumstances that you believe he was carrying on the business of furnishing whisky to those people who called him?'

And again, following comments on the testimony of the telephone girl at the Gayoso Hotel regarding telephone calls and the results thereof, including defendant's appearance with three quarts of whisky (presumably just before the arrest), the court said:

'Was that a matter of accommodating a friend, or was that conduct more in keeping with a man doing the business of selling whisky?'

In our opinion the charge, taken as a whole, does not contain reversible error.

(7) As to the invasion of the province of the jury: A trial judge in the federal court has an undoubted right to state to the jury his opinion upon the facts, provided he does so judicially and fairly and ultimately leaves to the jury the decision of questions of fact. *Young v. Corrigan*

(C. C. A. 6) 210 Fed. 442, 127 C. C. A. 174, and cases there cited. And we cannot say that in this case the trial judge went beyond the limits of fair comment, especially if, as is presumably the case, defendant took on the trial the legal position recently stated above. The question of fact in this case was quite largely narrowed down, under the evidence, to whether what defendant did was by way of accommodation or whether he was actually carrying on business. On consideration of the entire case, we are not impressed that prejudicial error was committed by the trial judge or that defendant has failed to receive a fair trial.

The judgment of the District Court is accordingly affirmed."

The case of *George D. Horning, Petitioner, v. District of Columbia*, decided by the Supreme Court of the United States, on November 22, 1920, being case No. 77, October term, 1920, (opinion in pamphlet form) illustrates the extent to which the trial court may legitimately express its opinion both as to the facts and the guilt or innocence of the defendant. In that case the lower court said in its charge to the jury:

"In conclusion, I will say that a failure to bring in a verdict in this case can arise only from a willful and flagrant disregard of the evidence and of the law as I have given it to you and a violation of your obligation as jurors. Of course, gentlemen, I cannot tell you in so many words to find defendant guilty, but what I say amounts to that."

The petitioner excepted to the charge of the Judge

and by a majority decision, the judgment of conviction was affirmed.

It is respectfully submitted that in charging the jury in this case the Court

(1) Instructed them correctly as to the law;

(2) Instructed them that they were the sole judges of the facts proved or disproved; and,

(3) Instructed them calmly and dispassionately.

The judgment should be affirmed.

John L. Leary  
Ronald Stegma  
Wellington H. Meigs

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Attorneys for Defendant in Error.



United States  
Circuit Court of Appeals

For the Ninth Circuit.

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NORSK HYDRO ELEKTRISK KVAELSTOF  
AKTIESELSKAB, a Corporation, and  
BJARNE ERIKSEN,

Appellants,

vs.

THE CALIFORNIA & ORIENTAL STEAM-  
SHIP COMPANY, a Corporation,

Appellee.

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Transcript of Record.

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Upon Appeal from the Southern Division of the  
United States District Court for the  
Northern District of California,  
First Division.

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FILED

SEP - 8 1921

F. D. MONCKTON,  
CLERK.



**United States**  
**Circuit Court of Appeals**

**For the Ninth Circuit.**

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NORSK HYDRO ELEKTRISK KVAELSTOF  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Attorneys of Record.**

Messrs. BELL, BROOKMAN, SIMMONS & CREECH, Alaska Commercial Bldg., San Francisco, and LOUIS FERRARI, Esq., Bank of Italy Bldg., San Francisco,  
Attorneys for Plaintiff.

Messrs. McCUTCHEN, OLNEY, WILLARD, MANNON & GREENE, Balfour Bldg., San Francisco, and Messrs. McCLANAHAN & DERBY, Merchants Exchange Bldg., San Francisco,  
Attorneys for Defendants.

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In the Southern Division of the District Court of the United States for the Northern District of California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAM-SHIP CO., a Corporation,  
Plaintiff,

vs.

NORSK HYDRO ELECTRISK KVALSTOF AKTIESELSKAB, a Corporation and BJARNE ERIKSEN, an Individual,  
Defendants.

**Order Appointing Receiver and Enjoining Interference With Him and Property in His Charge.**

The above-entitled cause having come on for hearing before this Court on the 8th and 9th days of

August, 1921, upon the order of this Court under date of August 6th, 1921, directed to the above-named defendants, ordering them and each of them to show cause, if any there were, why a receiver should not be appointed by this Court to take charge of, manage and operate the steamship "Pacifico," her engines, boilers, furniture, tackle, apparel and equipment, pending the final determination of this cause, and why this Court should not issue an injunction restraining said defendants from in any way or manner interfering with the possession or use thereof by such receiver or his officers, agents or servants; and upon the petition for appointment of a receiver and for an injunction *pendente lite*, herein; and upon the bill of complaint for declaration and enforcement of constructive trust and injunction and surrender of instruments herein; and upon the answer of said defendants to said bill of complaint; and upon the affidavits of O. H. Root, Louis Ferrari and G. W. Bell in support of said petition for appointment of a receiver and injunction [1\*] *pendente lite*; and upon the affidavits of C. Henry Smith, H. J. Hammer, Bjarne Eriksen and S. H. Derby, in resistance to said petition; and upon the testimony of said H. J. Hammer, given orally before said Court; and upon certain other documentary evidence, and oral admissions and stipulations by and between the attorneys for the respective parties made in open court; and upon all of the records and proceedings in the above-entitled matter.

\*Page-number appearing at foot of page of original certified Transcript of Record.

And this Court having read the aforesaid documents and documentary evidence, and having heard said oral testimony and said oral admissions and stipulations by and between the attorneys for the respective parties hereto; and having heard G. W. Bell, Esq., of counsel for the above-named plaintiff and petitioner, and Warren Olney, Jr., Esq., of counsel for the above-named defendants; and it appearing that said order to show cause and said petition were duly served upon the attorneys for said defendants on August 6th, 1921, and said defendants having appeared in response thereto; and it appearing that the steamship "Pacifico" is now in the bay of San Francisco, and within the Northern District of the State of California, and within the jurisdiction of this Court; and this Court having duly considered said documents and evidence, and the arguments of counsel for the respective parties, and having given the matter due deliberation.

And this Court having in open court suggested to the defendants herein the alternative that if the defendants would prefer to furnish a bond conditional that defendants would abide by and perform all orders and decrees which might be rendered in said cause, and would return said ship and property to this jurisdiction to abide by and perform the final decree in said cause in the event it should be in favor of plaintiff, instead of having a receiver appointed, said Court would, in [2] lieu of appointing a receiver, order such a bond to be furnished by defendants and would fix the amount

thereof, and the defendants having declined to accept such alternative course:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Captain John Leale, of San Francisco, California, be, and he hereby is appointed receiver, pending the final determination of this cause, or until the further order of this Court, of the steamship "Pacifico," her engines, boilers, furniture, tackle, apparel and equipment, and the whole thereof, including all books of account, log-books and other books, papers, records, documents and accounts, and all stores, supplies, fuel and movables and fixtures of every kind and nature whatsoever, upon said steamship, excepting only the personal effects of the master and crew of said steamship.

AND IT IS FURTHER ORDERED that said receiver be and he is hereby authorized immediately to take exclusive possession and charge of said steamship and described property, and to manage, operate and run the same in such manner as will in his judgment produce the most satisfactory results possible, and produce the greatest net profit, and to keep, preserve and protect said property in proper condition and repair; and in his discretion to employ and discharge and fix the compensation of the officers, and crew, and employees necessary to the operation of said steamship, and the business thereof, and to make such payments as may be needful and proper in so doing; and, in his discretion, to make and enter into contracts of affreightment and charter-party for said steamship; and to collect



the freights, charter hire and profits earned by said steamship; and to make appropriate payments therefrom on account of accruing charges incurred in the operation of said steamship, and the execution of this trust, and to keep said property in a proper state of repair for efficient use, and properly insured; and said receiver is [3] authorized and directed to keep said property adequately insured at all times against the perils of the sea, fire, and all other risks and contingencies against which it is usual and customary to carry insurance for vessels of the type and character of the steamship "Pacífico," and also to procure and carry insurance against such risks and contingencies in the operation of said steamship as it is usual and customary to carry insurance against in the operation of vessels of her type and character; and said receiver is authorized, in his discretion, to procure repairs to be made upon said vessel which are in the judgment of said receiver necessary or advisable to place or keep her in proper seaworthy condition and to procure supplies, materials, labor and other necessities required for the proper operation of said vessel; and said receiver may upon application to this Court and notice thereof to the parties to this cause, and the order of this Court hypothecate or pledge said steamship for the purpose of raising money for the purposes aforesaid and or the purpose of discharging any lien that may now exist or may hereafter arise on said steamship; and said receiver is authorized and empowered to institute and prosecute all such suits as may be necessary in his judg-

ment for the proper protection of said property and the operation thereof and the trust imposed in him, and likewise to defend all suits instituted against him as such receiver, or against said steamship; and said receiver is empowered to employ an attorney to aid him in the performance of his trust, said attorney to be paid out of the assets coming into the hands of the receiver.

And said receiver is authorized and directed to open proper books of account wherein shall be stated the earning, expenses, receipts and disbursements of said trust, and to preserve proper vouchers for all payments made by him on account thereof.

AND IT IS FURTHER ORDERED that the bond of said receiver [4] in the sum of \$50,000 conditioned that he will well and truly perform the duties of his office and duly account for all moneys or property which may come into his hands, and abide by and perform all things which he shall be directed to do, with sufficient sureties to be approved by a Judge of this court be filed in the office of the clerk of this court as a condition to the taking of possession of said property by said receiver, and that if this Court shall deem necessary it may hereafter require the amount of said bond to be increased or diminished.

AND IT IS FURTHER ORDERED that the master and officers and crew of said steamship "Pacifico" and all other persons whomsoever, be and they are hereby required and commanded forthwith, upon demand of said receiver or his duly authorized agents to turn over and deliver to said

receiver said steamship "Pacifico," her engines, boilers, furniture, tackle, apparel and equipment and the whole thereof, and all books of account log-books and other books, papers, records, documents and accounts and all stores, supplies, fuel and movables and fixtures and every kind and nature whatsoever, upon the said steamship, excepting only the personal effects of the master and crew on said steamship, and the master and crew and employees of said steamship are and each of them is hereby commanded and required to obey and perform such orders as may be given to them from time to time by said receiver or his authorized agents in operating said steamship and performing this trust.

And the defendant Nosrk Hydro Electrisk Kvalstof Aktieselskab and its officers, directors, agents, attorneys and employees, and the defendant Bjarne Eriksen, and all other persons claiming to act by, through, or under said defendants or either of them, and all other persons whomsoever, are hereby enjoined from interfering in any way whatsoever with the possession or management of said [5] property over which said receiver is hereby appointed, or any part thereof, and from interfering in any way to prevent the discharge of his duties or the operating of said property, and from in any way encumbering said property or attempting to so do, and from in any way transferring or attempting to transfer said property or any part thereof.

IT IS FURTHER ORDERED, as a condition to the taking of possession of said property by said receiver that the plaintiff California & Oriental

Steamship Company immediately file with the clerk of this court a bond in the sum of \$10,000.00, with sufficient sureties, to be approved by a Judge of this court, conditioned that said plaintiff will abide by and perform all orders and decrees of this Court rendered against or directed to said plaintiff, and will pay all damage suffered by the defendants through the appointment of said receiver in case said appointment is hereafter vacated or final judgment goes against the plaintiff and it be finally decided in said cause that plaintiff was not entitled to said receiver, and that if this Court shall deem necessary, it may hereafter require the amount of said bond to be increased or diminished.

Dated San Francisco, California, August 15th, 1921.

WM. C. VAN FLEET,  
Judge of United States District Court.

[Endorsed]: Filed Aug. 15, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [6]



In the Southern Division of the District Court of  
the United States for the Northern District of  
California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAM-  
SHIP Co., a Corporation,

Plaintiff,

vs.

NORSK HYDRO ELEKTRISK KVAELSTOF  
AKTIESELSKAB, a Corporation, and  
BJARNE ERIKSEN, an Individual,  
Defendants.

**Agreed Statement of Case for Use on Appeal from  
Order Appointing Receiver Pendente Lite.**

IT IS HEREBY STIPULATED: That on the  
16th day of July, 1921, the plaintiff in the above-  
entitled cause filed its bill of complaint herein, and  
service of summons was made upon the defendants  
on the 18th day of July, 1921. That the body of  
said complaint and its verification read:

**BILL OF COMPLAINT FOR DECLARATION  
AND ENFORCEMENT OF CONSTRUC-  
TIVE TRUST AND INJUNCTION AND  
SURRENDER OF INSTRUMENTS.**

The California & Oriental Steamship Co., a cor-  
poration duly organized and existing under and by  
virtue of the laws of the State of California, and  
having its principal place of business in the City  
and County of San Francisco, said state, brings



this [7] bill of complaint against Norsk Hydro Electric Kvalstof, a corporation organized and existing under and by virtue of the laws of the Kingdom of Norway, and having its principal place of business in said kingdom, and against Bjarne Eriksen, an individual residing in the city of Kristiania, Norway, and being a citizen of the Kingdom of Norway, and respectfully alleges:

### I.

The plaintiff, the California and Oriental Steamship Co., now is, and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the City and County of San Francisco, State of California.

### II.

That defendant Norsk Hydro Electric Kvalstof Aktieselskab, hereinafter for convenience called Norsk Hydro, now is and at all of the times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the Kingdom of Norway, and having its principal place of business in the city of Kristiania, Kingdom of Norway, and a citizen of said Kingdom of Norway.

### III.

That defendant Bjarne Eriksen is an alien, and now is, and at all of the times herein mentioned has been, a resident of the city of Kristiania, Kingdom of Norway, and a citizen of the Kingdom of Norway.

That defendant Bjarne Eriksen now is, and at

all of the times herein mentioned has been an officer of said defendant, Norsk Hydro, and is now in the City and County of San Francisco, State of California and within the Northern District [8] of California and within the jurisdiction of the Southern Division of the United States District Court for said District.

#### IV.

That the steamship "Pacifico," hereinafter mentioned, is a vessel of Norwegian registry, of about 5453 tons dead weight, whereof one H. J. Hammer is, or lately was master. That said steamship is now in the bay of San Francisco, in the State of California, and within the Northern District of California, and within the jurisdiction of the Southern Division of the United States District Court for said District.

#### V.

That in the month of October, 1920, and for some time theretofore, said steamship "Pacifico" was a vessel of Japanese registry, then called the "Taigai Maru" and owned by Japanese owners. That in said month of October, 1920, said vessel was in the port of Cardiff, Wales. That on or about the 27th day of October, 1920, plaintiff, the California and Oriental Steamship Company acting through and by its General Manager, purchased said steamship, for a valuable consideration from her Japanese owners, for the sole account of said California and Oriental Steamship Company. That instead of having the bill of sale from said Japanese owners run from them to plaintiff, the California and

Oriental Steamship Co., said corporation, acting through and by its said General Manager, caused said bill of sale to run and be made to one A. Mathiesen, of Kristiania, Norway, a citizen of the Kingdom of Norway, and said bill of sale was made to and the legal title to said steamship was so transferred to said A. Mathiesen. That said A. Mathiesen did not pay any consideration whatsoever for said vessel, or for having said bill of sale of her run to him, or for [9] having the legal title to said steamship so vested in him. That the legal title to said steamship was by plaintiff, acting through and by its said General Manager, so transferred to said A. Mathiesen, and by him accepted, to be by him held in trust for plaintiff corporation, solely in order that said steamship might be operated for the sole account of plaintiff corporation, under Norwegian registry and the flag of the Kingdom of Norway, and said A. Mathiesen never, either at that time or afterward, claimed or pretended to claim any right to the possession of said steamship or any beneficial interest in said steamship, or to hold her or the legal title to her otherwise than for the sole use, account and benefit of plaintiff corporation. That ever since the said steamship was so purchased, and from the time the legal title to her was so transferred to A. Mathiesen, said steamship has been in the sole possession of plaintiff corporation and operated by and at the expense of and for the sole account of plaintiff corporation and never by or for the account or at the expense of said A. Mathiesen, and at no time has said A.

Mathiesen claimed to operate her or that she was being operated for his account, or otherwise than for the sole account of plaintiff corporation.

## VI.

Plaintiff avers upon information and belief that during the month of January, 1921, said A. Mathiesen endorsed said bill of sale in blank and delivered the same to defendant, Norsk Hydro, and authorized said Norsk Hydro to make said transfer run to said Norsk Hydro or its nominee; and thereafter said Norsk Hydro made said transfer run to defendant, Bjarne Eriksen, an officer of said Norsk Hydro, as above alleged, and that said defendant Bjarne Eriksen thereupon caused said steamship [10] to be registered in the Kingdom of Norway in his name. That defendant Bjarne Eriksen, by reason of said transaction, now claims to be the legal owner of said steamship and to hold the legal title thereto, for the sole use and benefit of defendant Norsk Hydro, and defendant Norsk Hydro claims that defendant Bjarne Eriksen holds legal title thereto for the sole use and benefit of defendant Norsk Hydro, and said defendants claim the right to the possession and use of said steamship, and that plaintiff corporation has no interest of any kind, or description, either in or to the legal title or the possession or the use of said steamship.

## VII.

Plaintiff avers on information and belief that at the time said A. Mathiesen endorsed said bill of sale in blank and delivered it to said Norsk Hydro and authorized said Norsk Hydro to make said



transfer run to said Norsk Hydro or its nominee, and at the time said Norsk Hydro received such delivery and authorization, and at the time said Norsk Hydro caused said transfer to be made to run to defendant Bjarne Eriksen, and at the time said Bjarne Eriksen caused said steamship to be registered in his own name, as aforesaid, said Norsk Hydro knew and had notice, or had information which was sufficient to put a prudent man upon inquiry which would have led to the knowledge and notice that said A. Mathiesen held only the bare legal title to said steamship, and that he held the same in trust solely for the plaintiff corporation, and that the plaintiff corporation was the sole beneficial owner of said vessel and solely entitled to the possession and use of her, and was the sole real or equitable owner of her, and in actual possession of said steamship and operating her for [11] the sole account of plaintiff corporation, and at its expense.

### VIII.

Plaintiff avers on information and belief that said Norsk Hydro paid no good, sufficient or valuable consideration or equivalent for the aforesaid endorsement and delivery to it by said A. Mathiesen of said endorsed bill of sale and the aforesaid authorization to make said transfer run to it or its nominee, or for said endorsement or for said delivery or for said authorization, either to said A. Mathiesen, or to plaintiff corporation or to anyone whomsoever; and that, on the contrary, said endorsement, delivery and authorization were wholly without good, suffi-



cient or valuable consideration, and said Norsk Hydro received said endorsement, delivery and authorization as a mere volunteer. That neither said endorsement nor said delivery nor said authorization was directed or authorized to be made or made by plaintiff corporation, and said endorsement, delivery and authorization were made and given without the knowledge or consent of plaintiff corporation. That neither said endorsement nor said delivery nor said authorization was made for the account or benefit or use of plaintiff corporation, and plaintiff corporation derived no benefit therefrom.

### IX.

Plaintiff avers on information and belief that at the time said defendant Norsk Hydro made said bill of sale or transfer run to said defendant Bjarne Eriksen, and at the time defendant Bjarne Eriksen caused said steamship to be registered in Norway in his own name, said Bjarne Eriksen knew and had notice, or had information which was sufficient to put a prudent man upon inquiry which would have let to the knowledge and notice of all of the matters of which Norsk Hydro knew and had notice, as alleged in paragraph VII above, and knew and had [12] notice that Norsk Hydro had paid no consideration or equivalent for said endorsement or said delivery or said authorization to make said transfer run to said Norsk Hydro or its nominee, and that plaintiff corporation was the sole beneficial owner of said steamship and solely entitled to the possession and use of her, and was the sole real or equitable owner

of her, and in actual possession of said steamship and operating her for the sole account of plaintiff corporation, and at its expense.

### X.

Plaintiff avers on information and belief that defendant Bjarne Eriksen paid no good, sufficient or valuable consideration or equivalent for making the aforesaid transfer run to defendant Bjarne Eriksen, either to said A. Mathiesen, or to said Norsk Hydro or to plaintiff corporation, or to anyone whomsoever, and that, on the contrary, said transfer was by said Norsk Hydro made to run to defendant Bjarne Eriksen for no good, sufficient or valuable consideration and said Bjarne Eriksen received said transfer as a mere volunteer. That said transfer to defendant Bjarne Eriksen was not directed or authorized to be made or made by plaintiff corporation, and said transfer was made wholly without the knowledge or consent of plaintiff corporation. The *the* registry of said steamship in the name of defendant Bjarne Eriksen was not directed or authorized to be made or made by plaintiff corporation, and the resignation of said steamship in the name of said defendant was wholly without the knowledge or consent of said plaintiff corporation. That neither said transfer to defendant Bjarne Eriksen nor the registry of said steamship in his name was made for the use or account or benefit of plaintiff corporation, and plaintiff corporation derived no benefit therefrom. [13]

### XI.

That by virtue of the premises defendants herein

hold such title or interest as they or either of them took to said steamship "Pacifico," through or by the acts hereinbefore set forth, as trustees in trust for the sole benefit, account and use of plaintiff corporation, but claim to hold said steamship for the sole benefit, use and account of defendants, uncharged with any trust or equity in favor of plaintiff corporation and that plaintiff corporation has no equity or interest of any kind therein; and said claim of defendants is hostile to plaintiff corporation and in derogation of its rights and equities, and constitutes such a cloud on the title and the equities of plaintiff corporation in said steamship, and on the right of plaintiff corporation to the possession and beneficial use of said steamship that plaintiff corporation is hindered in the operation and enjoyment and use of said steamship, and in the procuring of credit upon the security of said steamship for her operation, and in the procuring of charters and contracts of affreightment for said steamship, and necessary material, supplies and labor for the operation of said steamship, and the operation or use of said steamship is rendered impossible until the titles, trusts, equities and rights of the parties to this bill are determined and adjudged.

## XII.

That defendant Bjarne Eriksen came to the City and County of San Francisco as an officer of said defendant Norsk Hydro, and in his individual capacity, for the purpose of representing said defendants in and about their claims to said steamship, and all parties concerned with or in all legal and

[14] equitable titles or claims to said steamship are now within the jurisdiction of this Honorable Court, and it is in a position to make determination of the rights of plaintiff and defendants to said steamship, both legal and equitable.

### XIII.

That by reason of the premises and the hostile claims of said defendants, plaintiff corporation has suffered great, immediate and irreparable damage and loss of property and property rights of plaintiff and the use and earnings and benefit of said steamship. That said steamship "Pacifico" is an article of personal property of a special kind, and of unique and individual character, and of special and peculiar value to plaintiff and cannot be replaced and her value and the value of her and of her use to plaintiff cannot be estimated or computed with certainty. That the value of said ship is in excess of the sum of \$350,000. That the plaintiff will continue to suffer great and irreparable damage and loss of property and property rights, and the use and earnings and benefit of said steamship unless the relief herein prayed for is granted. That plaintiff is without any adequate remedy at law or admiralty in the premises. That unless defendants be restrained and enjoined from so doing they will remove said steamship from the jurisdiction of this Honorable Court and will use her for their benefit and subject her to the risk of loss and destruction by perils of the sea and accidents and disasters of navigation, all to the irreparable damage and injury of plaintiff.



XIV.

That by reason of the premises plaintiff has been damaged in a large sum of money by defendants and no part of such damages have been paid by defendants or otherwise. That [15] such damage is continuing and the exact amount thereof is impossible of ascertainment, at the present time, but plaintiffs pray that his Honorable Court do ascertain by reference to a master or otherwise the extent and amount of such damages, and that plaintiff have judgment against defendants for the amount so ascertained, together with a reasonable attorneys' fee incurred by plaintiff in this action.

WHEREFORE plaintiff prays:

First: That said defendants and each of them and their agents, officers, directors, servants and attorneys, be restrained and enjoined from removing said steamship or any of her engines, boilers, apparel, tackle or furniture or equipment, or any part thereof from the jurisdiction of this Honorable Court pending the determination of this suit, and from selling, alienating, or in any manner encumbering or in any way disposing of the same, or attempting so to do or in any way using or operating or interfering therewith, or attempting so to do.

Second: That defendants be ordered, declared and decreed to hold such title or interest in said steamship as they acquired by reason of said transfer from A. Mathiesen and said transfer to Bjarne Eriksen and the registry of said steamship in the name of said Bjarne Eriksen, as trustees thereof for the sale use, benefit and account of the Cali-



ifornia and Oriental Steamship Company, and that it be declared and decreed that said defendants have and that neither of them has any title or beneficial interest or rights in or to said steamship "Pacifico" or her engines, boilers, furniture, tackle, apparel or equipment or any part thereof, and that said trust in defendants be enforced and executed; and that it be ordered, declared and decreed that plaintiff, California and Oriental Steamship Company, is the sole beneficial and equitable owner of said steamship "Pacifico," her engines, boilers, [16] tackle, apparel, furniture and equipment, and entitled to the sole possession and use thereof.

Third: That defendants be ordered and compelled to deliver to plaintiff, the California and Oriental Steamship Company, a bill or bills of sale transferring and conveying to said California and Oriental Steamship Company, or to such other person as it may designate, all right, title, claim and interest of said defendants in and to said steamship and her engines, boilers, tackle, furniture, apparel and equipment, and the whole thereof.

Fourth: That defendants be ordered and compelled to surrender and deliver up to the California and Oriental Steamship Company or to such person as it may designate, all and every document or documents which said A. Mathiesen delivered to defendant, Norsk Hydro, and all and every the document or documents which Norsk Hydro delivered to defendant Bjarne Eriksen transferring or purporting to transfer any title, interest or right in said steamship, her engines, boilers, tackle, apparel,

furniture or equipment to said defendants or either of them.

Fifth: That pending the determination of this suit, said defendants be restrained and enjoined from in any way or manner interfering with the possession or use of the California and Oriental Steamship Company or its officers, agents and servants of said steamship "Pacifico," her engines, boilers, furniture, tackle, apparel and equipment, and be enjoined from interfering with plaintiff's possession thereof.

Sixth: That forthwith upon the filing of this bill of complaint, a temporary restraining order be issued by this Honorable Court restraining said defendants and each of them from removing said steamship "Pacifico," or any of her engines, boilers, apparel, tackle, furniture or equipment or any part [17] thereof from the jurisdiction of this Honorable Court, and from encumbering, selling or in any way disposing of the same, and from in any manner using or operating or interfering therewith the possession thereof from the time that defendants shall have knowledge of the existence thereof.

Seventh: That the amount of damages caused to plaintiff by the acts of defendants herein complained of be ascertained by a reference to a master or otherwise, and that plaintiffs have judgment therefor and for the amount of a reasonable attorney's fee incurred by plaintiff in this action, against defendants.

Eighth: That plaintiff may have such other and

further relief and remedy in the premises as *may just* and equitable, including its costs.

LOUIS FERRARI,  
BELL,    BROOKMAN,    SIMMONS    &  
CREECH,

Attorneys for Plaintiff.

United States of America,  
Northern District of California,  
City and County of San Francisco,—ss.

Richard Fitzpatrick, being first duly sworn, deposes and says that he is an officer of the California & Oriental Steamship Company, the plaintiff in the above complaint, and as such authorized to make this verification on behalf of plaintiff herein named; that he has read the foregoing Bill of Complaint and knows the same is true of his own knowledge except as to the matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

RICHARD FITZPATRICK.

Subscribed and sworn to before me, this 15th day of July, 1921.

[Seal]                      THOMAS S. BURNES,  
Notary Public in and for the City and County of  
San Francisco, State of California.    [18]

That on the 6th day of August, 1921, there was presented to the Judge of the above-entitled court a petition in said cause by the plaintiff for the appointment of a receiver, reading:

PETITION FOR APPOINTMENT OF A  
RECEIVER AND FOR AN INJUNCTION  
PENDENTE LITE.

Your petitioner respectfully petitions this Court for its order appointing a receiver and for an injunction *pendente lite* and as a ground for said petition alleges as follows:

I.

This petitioner refers to the allegations contained in the complaint on file in this action and by reference incorporates said allegations herein as fully in all respects as though again and herein set out.

II.

Since the purchase by petitioner, The California & Oriental Steamship Co., of said steamship "Pacífico" on or about the 27th day of October, 1920, all as in said complaint set forth, said steamship has been operated by and at the expense of and for the sole account of this petitioner. At all of said times and at the present time said steamship has been in the direct charge of one H. J. Hammer as master. Up till on or about the 15th day of July, 1921, said H. J. Hammer as master of said steamship "Pacífico" received, obeyed and followed all orders and instructions delivered to him by this petitioner and operated said vessel in accordance therewith. On or about the 15th day of July, 1921, and since said steamship has been in the waters of San Francisco Bay, said H. J. Hammer failed and since has failed to obey and act in compliance with the [19] orders and instructions given to him as mas-



ter of said steamship "Pacífico" by this petitioner, incident to the management, control and operation of said steamship "Pacífico." This petitioner is informed and believes and basing his allegations on that ground alleges that said H. J. Hammer, as master of the said steamship "Pacífico," has since the 15th day of July, 1921, obeyed and complied with the instructions and orders given to him by said defendant, Norsk Hydro. This petitioner is informed and believes, and basing his allegations on that ground alleges, that said Norsk Hydro claims to be entitled to the immediate possession and control of said steamship "Pacífico" and intends and will, unless restrained by the order of this Court, endeavor to operate, and incident to the said operation, remove same from the jurisdiction of this Court. The claims of said defendant to operate said steamship "Pacífico" for the sole use and benefit of and to the sole account of said defendants are hostile to the interest, right and title of said petitioner in said steamship and because of said hostile claims of said defendants it is impossible for this petitioner to procure charters and contracts of af-freightment for the said steamship and necessary materials, supplies and labor required for the operation of the said steamship.

In order to procure the material evidence necessary to present to this Court in order to permit this Court to be fully advised as to the issue herein involved and in order to permit this Court to fully and equitably adjudicate the right, title and interest of various parties herein involved it will be



necessary to procure the attendance of or take the depositions of A. Mathiesen, residing at Kristiania, Norway, and other witnesses now residing beyond the jurisdiction of this Court. [20] Because of this fact it will be impossible to bring the above-entitled cause to final hearing and trial on the merits for a period of several months.

Said steamship "Pacífico" is a vessel of a value in excess of \$350,000, and said steamship and her apparel and equipment are subject to serious depreciation in value by virtue of nonusage and those legally and equitably entitled to the use, earnings and benefit of said steamship will suffer great and irreparable injury if said steamship is not operated for the length of time necessary to permit of a full and final adjudication by this Court upon the right, title and interest in and to said steamship.

In order to conserve the property of said steamship and in order to protect the right and interest of those entitled to the operation, use, earnings and benefits in and to said steamship it is necessary that this Court appoint a receiver to take charge of said steamship and her equipment and apparel and to operate, manage and control the same during and pending the final adjudication by this Court of the rights of the parties hereto in and to said steamship and the use and earnings thereof.

WHEREOF this petitioner prays:

First: That this Court by its order appoint a receiver to take over the management, operation and control of said steamship "Pacífico," together with her engines, boilers, furniture, tackle, apparel and

equipment for the use and benefit and account of such party or parties as this Court may finally determine is or are legally and equitably entitled thereto.

Second: That pending the final determination of this suit this Court issue an injunction restraining and enjoining all parties hereto from in any [21] way or manner interfering with the possession or use of the receiver appointed by this Court or his officers, agents or servants in and to said steamship "Pacifico," her engines, boilers, furniture, tackle, apparel and equipment.

Third: For such other, further and additional relief as in the premises may seem just and equitable.

BELL, BROOKMAN, SIMMONS & CREECH.

United States of America,  
Northern District of California,  
City and County of San Francisco,—ss.

Louis Ferrari, being first duly sworn, deposes and says that he is an officer, to wit, Acting Secretary of the California & Oriental Steamship Company, the petitioner in the above petition, and as such authorized to make this verification on behalf of petitioner herein named; that he has read the foregoing petition and knows the contents thereof, that same is true of his own knowledge except as to matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

LOUIS FERRARI.

Subscribed and sworn to before me this 6th day of August, 1921.

[Seal]

VIRGINIA A. BEEDY,

Notary Public in and for the City and County of San Francisco, State of California. [22]

That upon the presentation of said petition, and on the same day, said Judge made an order directing the defendants to show cause why a receiver should not be appointed as petitioned for by the plaintiff, said order reading:

### ORDER TO SHOW CAUSE.

On reading the petition and complaint of the California & Oriental Steamship Co., a corporation, petitioner herein, and the same being filed in the above-entitled cause and sufficient cause appearing therefor,

IT IS HEREBY ORDERED that Norsk Hydro Electris Kvalstof Aktieselskab and Bjarne Eriksen and each of them be and appear before this Court in open court at the courtroom thereof on the 8th day of August, 1921, at 10 o'clock A. M. thereof, to show cause, if any there be, why a receiver should not be appointed by this Court to take charge, manage and operate the steamship "Pacifico," her engines, boilers, furniture, tackle, apparel and equipment, pending the final determination of this cause and why this Court should not further issue an injunction restraining them, the said Norsk Hydro Electris Kvalstof Aktieselskab and Bjarne Eriksen, and all parties to the above-entitled cause from in any way or manner interfering with the possession or use of the receiver appointed by this Court or his

officers, agents or servants in and to said steamship "Pacífico," her engines, boilers, furniture, tackle, apparel and equipment.

AND IT IS FURTHER ORDERED that a copy of this order certified under the hand of the clerk and seal of this court, together with copy of petition herein in support thereof be served upon said Norsk Hydro Electric Kvalstof Aktieselskab and Bjarne Eriksen, and each of them.

(Signed) WM. C. VAN FLEET,

Judge. [23]

That on said 6th day of August, 1921, defendants served and filed their answer. That the body of said answer and its verification read:

#### ANSWER.

Now come the defendants Norsk Hydro Electric Kvalstof Aktieselskab, a corporation, hereinafter for the sake of brevity referred to as "Norsk Hydro," and Bjarne Eriksen, and answering the bill of complaint of plaintiff herein admit, deny and allege as follows:

#### I.

Answering the allegations of subdivision V of said complaint, the defendants deny that the plaintiff on or about the 27th day of October, 1920, or at any other time, purchased the steamship known as the "Pacífico" and mentioned in said complaint. The defendants also deny that upon the purchase of said steamship from its former Japanese owners the plaintiff caused the bill of sale evidencing said purchase to run or be made to one A. Mathiesen mentioned in the complaint, or to anyone else.



Defendants further deny that the legal title to said vessel transferred to said Mathiesen was so transferred to be by him held in trust for the plaintiff, or that said steamship or the legal title thereto was at any time held by said Mathiesen in trust for the plaintiff or for its use, account or benefit. Defendants further deny that said steamship has been at any time, or is now, in the possession of the plaintiff, or has been or is being operated by or at the expense of or for the account of plaintiff, or that said Mathiesen has at any time claimed to operate, or has operated, said steamship for the account of plaintiff. [24]

## II.

Answering the allegations of subdivision VII of the complaint, the defendants deny that at or prior to the defendant Norsk Hydro taking a bill of sale from said Mathiesen as alleged in subdivision VI of the complaint, and giving the full consideration given by it therefor, the defendants, or either of them, knew or had notice that said Mathiesen held the legal title to said vessel in trust for anyone other than one C. Henry Smith or had information which was sufficient to put a prudent man upon an inquiry which would have led to knowledge or notice that the legal title to said vessel was held by said Mathiesen in trust for anyone other than said Smith, or that anyone other than said Smith was a beneficial owner of said vessel or entitled to her possession or use, or that anyone other than said Smith was in actual possession of said vessel or operating her for account of anyone except said Smith; and in



this behalf the defendants allege that said bill of sale was made by said Mathiesen to the defendant Norsk Hydro at the instance of said Smith and for a valuable consideration given to him by the defendant Norsk Hydro in the full and genuine belief that he was the sole beneficial owner of said vessel.

### III.

Answering the allegations of subdivision VIII of said complaint, the defendants deny that the defendant Norsk Hydro did not pay a good, sufficient and valuable consideration for the endorsement and delivery to it by said Mathiesen of the bill of sale for said vessel as alleged in the complaint, or for the authorization to said defendant, alleged in the complaint, to make said transfer run to it or to its nominee, and in this behalf allege [25] the fact to be that at the time of the endorsement and delivery of said bill of sale and the making of the aforesaid authorization, the defendant Norsk Hydro did pay a good, sufficient and valuable consideration therefor. Defendants further deny that said endorsement, delivery and authorization, or any of them, were without a good, sufficient or valuable consideration given by said Norsk Hydro, or that the same were received by said Norsk Hydro as a volunteer.

### IV.

Answering the allegations of subdivision IV of the complaint, defendants deny that the defendant Eriksen ever knew or now knows, or ever had notice or now has notice that the defendant Norsk Hydro paid no consideration for the endorsement or de-

livery of said bill of sale or for the authorization to make the transfer of said vessel run to said Norsk Hydro or to its nominee, or that the plaintiff was the beneficial owner of said vessel or entitled to her possession or use, or was her real or equitable owner, or was in actual possession of her, or was operating her for the account of the plaintiff or at its expense.

V.

Answering the allegations of subdivision X of the complaint, the defendants admit that the defendant Eriksen paid no consideration for having the legal title to said vessel transferred to him, and allege in this behalf that he holds said legal title for and on account of the defendant Norsk Hydro and for and on its account alone. [26]

VI.

Answering the allegations of subdivision XI of the complaint, the defendants deny that they or either of them hold any title or interest in said vessel in trust for the plaintiff, or for the plaintiff's benefit, account or use, and deny that the plaintiff has any right, title or equity in said vessel.

VII.

Answering the allegations of subdivision XIII of the complaint, the defendants deny that the plaintiff has suffered any damage or loss of property or property rights by reason of the premises contained in the complaint or of the claims of the defendants, or of either of them, to said vessel, and defendants further deny that said steamship "Pacifico" is an article of personal property of a special kind or of

unique or individual character or of special or peculiar value to plaintiff, or that she cannot be replaced or that her value and the value of her use to the plaintiff cannot be estimated or computed with certainty. The defendants further deny that the value of said vessel is in excess of three hundred and fifty thousand (350,000) dollars, or that said vessel is of a present value approximating that amount. The defendants further deny that the plaintiff will continue to suffer any damage or loss of property or property rights unless the relief prayed for in the complaint is granted. The defendants further deny that the plaintiff is without any adequate remedy at law or in admiralty. The defendants admit that they intend to use said vessel for the benefit of the defendant Norsk Hydro and that as a necessary incident of such use she will be sent to sea and thereby subjected to the risk of loss and destruction by perils of the sea [27] and accidents and disasters of navigation, but deny that the same will be of any damage or injury to the plaintiff.

#### VIII.

Answering the allegations of subdivision XIV of the complaint, defendants deny that plaintiff has been damaged by the defendants in any sum of money whatsoever.

For a second and further, separate and distinct defense to the complaint, the defendants allege:

#### I.

That on or about the 27th day of October, 1920, the steamship mentioned in the complaint was a

vessel registered under the laws of the Empire of Japan under the name of "Taiga Maru" and was owned by citizens of said Empire. That on or about said date said vessel was purchased from said owners by one C. Henry Smith as the ostensible purchaser. That upon said purchase being made, said Smith caused said vessel to cease to be registered under the laws of the Empire of Japan and to be registered under the laws of the Kingdom of Norway under the name "Pacifico," and with one A. Mathiesen, a citizen of said Kingdom, as the registered owner thereof. That said A. Mathiesen accepted and held the registered ownership of said vessel as aforesaid in trust for said Smith as the sole beneficial owner and for no one else. That at the time of said purchase said Smith took possession of said vessel and remained in possession of her until he delivered such possession to the defendants [28] as hereinafter alleged. That the plaintiff permitted the said Smith to purchase said vessel as himself the ostensible purchaser, to cause her to be transferred as aforesaid to a Norwegian register in the name of said Mathiesen as owner, to have said Mathiesen accept and hold such registered ownership in trust for said Smith and no one else, and to take and retain possession of said vessel. That until on or about the 20th day of April, 1921, the plaintiff made no claim that it was the true beneficial owner of said vessel or had any interest therein, took no steps to inform said Mathiesen that it was or claimed to be the beneficial owner of said vessel, took no steps to require of said Mathiesen



that he hold the legal title to said vessel in trust for it instead of said Smith, and took no steps to secure possession of said vessel. That by reason of the aforesaid facts the plaintiff permitted the said Mathiesen and Smith to be clothed with all the indicia of title and ownership to said vessel as the legal and beneficial owners thereof, respectively, and to remain so clothed until on or about the said 20th day of April, 1921.

## II.

That long prior to said 20th day of April, 1921, and while said Mathiesen and Smith were clothed with the indicia of title and ownership of said vessel, as aforesaid, and on or about the 17th day of January, 1921, the defendant Norsk Hydro purchased the legal and beneficial ownership of said vessel for a consideration and under circumstances as follows:

That the defendant Norsk Hydro was and is a considerable manufacturer of nitrates. That for a considerable period prior to the 17th day of January, 1921, it had engaged in a course of [29] business with said Smith whereby it sold him nitrates manufactured by it to be resold by him, or whereby it delivered nitrates to him to be sold by him for it upon a *del credere* commission. That in pursuing said course of business it was the custom between said defendant and said Smith for the former to deliver nitrates to the latter without requiring payment therefor in advance of delivery, the amount of the purchase price being charged by said defendant against Smith upon an open account be-



tween them. That on the 17th day of January, 1921, and for some time prior thereto, Smith was and had been indebted to said defendant upon said open account in the amount of approximately one hundred and fifty thousand (150,000) dollars. That while Smith was so indebted to it, and prior to the 17th day of January, 1921, the defendant refused to deliver further nitrates to said Smith without payment therefor upon delivery, unless Smith should pay or adequately secure said account. That said Smith thereupon, and prior to said 17th day of January, 1921, offered to cause said steamship "Pacifico" to be transferred to said defendant or its nominee as security for said account, provided the defendant would thereafter continue to deliver nitrates to him without requiring, as a condition thereof, the payment of the purchase price therefor, but would allow such price to be charged against him upon said open account. That immediately prior to the 17th day of January, 1921, there was expected to arrive in California a consignment of nitrates shipped by the defendant Norsk Hydro to said Smith. That said defendant refused to deliver to Smith the shipping documents for said consignment so that Smith might obtain delivery of the same upon arrival. That said consignment arrived and was stored and held for the account of said defendant. That the purchase price of said consignment was approximately ninety thousand [30] (90,000) dollars. That thereafter, and prior to the 17th day of January, 1921, said defendant agreed to said offer of said Smith, and thereupon, and in

performance thereof, and on the 17th day of January, 1921, the said Smith caused said Mathiesen to transfer said vessel to the defendant by the endorsement and delivery to the latter of the bill of sale therefor, and thereupon said defendant, in consideration therefor, caused said consignment of nitrates hereinbefore last mentioned to be delivered to said Smith without payment of the purchase price therefor, charging said purchase price against said Smith upon said open account. That by reason of the matters just hereinbefore alleged, the balance due from said Smith to said defendant upon said open account was increased to the sum of approximately two hundred and forty thousand (240,000) dollars. That no part of said balance has been paid and the same is now due and payable by said Smith to said defendant.

### III.

That said defendant accepted said bill of sale in the full and genuine belief that said Mathiesen as the registered owner of said vessel held the legal title thereto in trust for said Smith and no one else, and that said Smith and no one else was the beneficial owner thereof. That until long after the occurrence of the matters alleged in the last preceding subdivision of this answer, neither of the defendants had notice or knowledge that said Smith was not the sole beneficial owner of said vessel and had no notice or knowledge of facts or circumstances which would have put a reasonably prudent man upon inquiry as to his ownership. [31]

#### IV.

That after the receipt of said bill of sale as aforesaid the defendant caused the name of the defendant Eriksen to be inserted as the buyer in said bill of sale and by virtue of said bill of sale caused the registered ownership of said vessel to be transferred from the said Mathiesen to said Eriksen. That said defendant Eriksen thereupon took and received possession of said vessel from said Smith. That said Eriksen holds said registered ownership and possession for and as the agent of the defendant Norsk Hydro and as security to the latter for the payment of said indebtedness, two hundred and forty thousand (240,000) dollars, of said Smith.

And for a third and further, separate and distinct defense, defendants allege upon information and belief:

#### I.

That on or about the 19th day of October, 1920, said C. Henry Smith hereinbefore mentioned and certain other individuals agreed together to purchase from her then Japanese owners, as hereinbefore alleged, the steamship mentioned in the complaint. That for purposes of convenience it was agreed by said Smith and said individuals to use the plaintiff as a temporary organization representing their association together in the enterprise of purchasing and owning said vessel, but that plaintiff itself was not to have any interest in said vessel. That said individuals agreed to contribute sixty thousand (60,000) dollars toward the purchase price of said vessel. That the purchase [32] price of

said vessel was approximately three hundred and fifty thousand (350,000) dollars. That it was agreed that the actual purchasing of the vessel and its operation thereafter should be done by said Smith, and that a portion of the purchase price should or might be obtained by mortgaging the vessel. That said Smith did purchase said vessel from her then Japanese owners as hereinbefore alleged, but instead of mortgaging the vessel to obtain a portion of the purchase price, he actually paid the full purchase price with his own funds. That thereafter said individuals through the instrumentality of the plaintiff paid said Smith the sixty thousand (60,000) dollars which they had agreed to contribute toward the purchase price of said vessel as aforesaid, but with the exception of said sixty thousand (60,000) dollars said Smith has not been reimbursed and there has not been repaid to him or tendered to him any part of the purchase price of said vessel so paid by him with his own funds. That the amount of the purchase price for which he has not been reimbursed is approximately two hundred and ninety thousand (290,000) dollars.

## II.

That upon the making of said purchase said Smith took possession of said vessel and caused her to be registered under the laws of the Kingdom of Norway in the name of A. Mathiesen, as hereinbefore alleged. That said Smith remained in possession of said vessel until she was transferred to the defendants as hereinbefore alleged. That said Smith caused said Mathiesen to accept said regis-



tered ownership upon the trust that he would hold the same for the account and subject to the order of said Smith. That by reason of the foregoing facts said Smith had, in case said purchase were in reality for the account of the [33] plaintiff as alleged in the complaint, an equitable lien upon said vessel for the reimbursement to him of the amount of the purchase price therefor which he had paid and for which he had not been reimbursed. That thereafter, and as hereinbefore alleged, said Smith caused said Mathiesen to endorse and deliver to the defendant Norsk Hydro the bill of sale for said vessel as security for the sum of two hundred and forty thousand (240,000) dollars due by said Smith to said defendant. That under and by virtue of said endorsement and delivery of said bill of sale all of the rights, interests and equities of said Smith in and concerning said vessel passed to said defendant. That under and by virtue of said bill of sale said defendant Norsk Hydro caused the registered ownership of said vessel to be transferred to defendant Eriksen.

### III.

That the plaintiff was not entitled to require of said Smith the transfer to it of the control, possession or title of or to said vessel, or to require that it be acknowledged by said Mathiesen as he beneficial owner instead of Smith, or to have the registered ownership of the vessel transferred to one who would hold it for the account or benefit of the plaintiff without repaying the said Smith the said sum of approximately two hundred and ninety thousand



(290,000) dollars which he had furnished as aforesaid toward the purchase price of said vessel and for which he had not been reimbursed. That after the endorsement and delivery of said bill of sale to the defendant Norsk Hydro by said Mathiesen at the instance of said Smith, the plaintiff was not, and is not now, entitled to have transferred to it the control, possession or title of or to said vessel or to be acknowledged [34] by the registered owner thereof as her beneficial owner or to have her registered ownership transferred to one who would hold it for the account or benefit of plaintiff, without repaying to said Norsk Hydro, as the successor in interest of said Smith, the said sum of approximately two hundred and ninety thousand (290,000) dollars. That the plaintiff has at no time tendered or offered to pay either said Smith or said defendant the amount of the purchase price which said Smith furnished as aforesaid and for which he had not been reimbursed, or any part thereof.

For a fourth and further, separate and distinct defense the defendants allege:

I.

That by the laws of the Kingdom of Norway, under which the vessel mentioned in the complaint herein is registered, and to which said vessel and all interests therein, both legal and beneficial, are subject, it is and has been since July 21, 1916, unlawful and prohibited, both that either the legal or beneficial ownership of a vessel registered under the Norwegian laws be held by one not a citizen of Norway or by a corporation not organized and existing under the laws of Norway, and that the legal

or beneficial ownership of such vessel be transferred to one not a citizen of Norway, or to a corporation not organized and existing under the laws of Norway. That by the laws of Norway any violation of said prohibition is punishable by fine or imprisonment imposed upon those guilty of such violation, and by a forfeiture of the vessel or interest therein which was the subject [35] of such violation.

II.

That by reason of said prohibition the defendants cannot transfer either the registered or beneficial ownership of said vessel to the plaintiff as prayed for in said complaint without being guilty of a violation of said laws and subjecting themselves to fine and imprisonment, and said vessel to forfeiture. That the defendant Norsk Hydro is a corporation organized and existing under the laws of the Kingdom of Norway and the defendant Eriksen is a citizen and resident of said kingdom.

That plaintiff is not a corporation organized and existing under the laws of said kingdom, and that by reason of that fact and of the said prohibition hereinbefore alleged, the plaintiff may not lawfully become or be either the registered or beneficial owner of said vessel.

WHEREFORE, the defendants having fully answered the complaint, pray for judgment against the plaintiff that it take nothing by this action, and for costs of suit.

McCUTCHEN, OLNEY, WILLARD, MAN-  
NON & GREENE,  
McCLANAHAN & DERBY,

Attorneys for Defendants. [36]

State of California,

City and County of San Francisco,—ss.

Bjarne Eriksen, being first duly sworn, deposes and says: That he is one of the defendants named in the foregoing answer; that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge except as to those matters therein stated on information and belief, and as to those matters, he believes it to be true.

BJARNE ERIKSEN.

Subscribed and sworn to before me this 6th day of August, 1921.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California. [37]

That at the time and place specified in said order to show cause the defendants appeared and a hearing was had. In support of the petition the plaintiff presented its complaint and verified petition hereinbefore set out. In opposition, the defendants presented their answer hereinbefore set out and the affidavits of S. H. Derby, J. H. Hammer, C. Henry Smith and Bjarne Eriksen. Said affidavits, omitting the captions and verifications, read:

AFFIDAVIT IN RESISTANCE OF PETITION  
FOR APPOINTMENT OF RECEIVER AND  
FOR AN INJUNCTION PENDENTE LITE.

State of California,

City and County of San Francisco,—ss.

S. H. Derby, being first duly sworn, deposes and

says: That he is one of the attorneys for the defendants in the above-entitled action. That he has read the petition of the plaintiff in said action for the appointment of a receiver and knows the contents thereof. That the statement in said petition that up until on or about the 15th day of July, 1921, the master of the steamship "Pacifico" mentioned in said petition obeyed and followed the orders and instructions delivered to him by the plaintiff and operated said vessel in accordance therewith, is wholly untrue. That on the 31st day of May, 1921, said plaintiff filed a libel in admiralty in the First Division of the above-entitled court, alleging that it was the true and lawful owner of said vessel and that possession thereof was withheld from it by said master and one C. Henry Smith, and praying for a judgment of said Court that possession of said vessel be delivered to it. That a copy of said libel is hereunto attached and made a part hereof. That thereafter, and on or about the 23d day of July, 1921, [38] said libel, without having come on for trial and without the plaintiff having obtained possession of said vessel, was dismissed by the plaintiff.

That said vessel had been in the harbor of San Francisco continuously since before the date of the filing of said libel, to wit, the 31st day of May, 1921. That at that time, and at all times since, the plaintiff has been aware of the claim of the defendants that they were the legal and beneficial owners of said vessel, and plaintiff had ample opportunity to apply for the relief now sought. That on or about the

16th day of July, 1921, plaintiff brought the above-entitled action, alleging in its complaint that it was the beneficial owner of said vessel. That thereafter, and on the 22d day of July, 1921, plaintiff and the defendants agreed, through their respective attorneys, that the defendants would not send said vessel to sea for a period of twenty (20) days thereafter. That the purpose of said agreement was to afford the plaintiff an opportunity to apply for an injunction *pendente lite*, restraining the sending of said vessel to sea, or for obtaining such other relief of a similar nature as plaintiff might desire. That thereafter, and on or about the 25th day of July, 1921, the attorneys for the plaintiff were informed by letter by the attorneys for the defendants that the latter must insist, for reasons stated in said letter, that such application be made at as early a date as possible. That a copy of said letter is hereunto attached and made a part hereof. That it was possible for the plaintiff to immediately make such application. That nevertheless the plaintiff delayed making such application until the 6th day of August, 1921, and that such delay was without any excuse whatsoever, so far as affiant is aware.

(Signed) S. H. DERBY. [39]



(Copy of libel referred to in foregoing affidavit.)

In the Southern Division of the United States  
District Court for the Northern District of  
California, First Division.

IN ADMIRALTY—No. —.

THE CALIFORNIA & ORIENTAL STEAMSHIP  
CO., a Corporation,

Libelant,

vs.

Norwegian Steamship “PACIFICO,” Her Engines,  
Boilers, Tackle and Furniture; H. J. HAM-  
MER and C. HENRY SMITH,

Respondents.

LIBEL FOR POSSESSION AND RESTITU-  
TION.

To the Honorable M. T. DOOLING, Judge of the  
Above-entitled Court:

The libel of California & Oriental Steamship Com-  
pany, a corporation, against the Norwegian Steam-  
ship “Pacífico,” her engines, boilers, tackle and fur-  
niture and against C. Henry Smith and against  
H. J. Hammer, and also against all persons lawfully  
intervening for their interest in said steamer, in a  
cause of possession, civil and maritime, allege as  
follows:

I.

That libelant, California & Oriental Steamship  
Company is a corporation duly organized and ex-  
isting under and by virtue of the laws of the State  
of California, having its principal place of business

in the City and County of San Francisco, State of California. [40]

## II.

That said steamship "Pacífico" is a Norwegian vessel of about 5453 tons dead weight, whereof one H. J. Hammer is, or was lately, master, and that the said steamship "Pacífico" is now lying in the port of San Francisco.

## III.

That libelant is the true and lawful owner of said steamship "Pacífico"; that the possession of the said steamship is wrongfully withheld from the said libelant by the said H. J. Hammer and C. Henry Smith on an alleged ground of title to the possession of said vessel; that the said claim of title to the possession of said vessel is entirely false and invalid.

That all and singular the premises are true and within the maritime jurisdiction of this Honorable Court.

WHEREFORE libelant prays that process in due form of law according to the course and practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against said steamship "Pacífico," her engines, boilers, tackle and furniture and that the said H. J. Hammer and C. Henry Smith and all other persons having or pretending to have any right, title or interest in the said steamship may be cited to appear before this Honorable Court and show cause why possession of said steamer shall not be delivered to libelant and that this Honorable Court will be pleased to decree that the possession of said steamship be delivered to the

libelant and to administer such other and further relief as shall to law and justice appertain and also to condemn said H. J. Hammer and C. Henry Smith and all persons intervening for their interest in said steamship in costs.

BELL, BROOKMAN, SIMMONS &  
CREECH,

Proctors for Libelant. [41]

State of California,

City and County of San Francisco,—ss.

Richard Fitzpatrick, being duly sworn, deposes and says: That he is an officer, to wit, the Secretary of the California & Oriental Steamship Co., the libelant herein; that he has read the foregoing libel and knows the contents thereof; that same is true of his own knowledge except as to the matters therein stated upon his information or belief, that as to those matters he believes it to be true.

RICHARD FITZPATRICK.

Subscribed and sworn to before me this 31st day of May, 1921.

C. W. CALBREATH,

Notary Public in and for the City and County of  
San Francisco, State of California,

Deputy Clerk U. S. District Court, Northern Dis-  
trict of California. [42]

(Copy of letter referred to in foregoing affidavit.)

July 25, 1921.

Messrs. Bell, Brookman, Simmons & Creech,  
Alaska Commercial Building,  
San Francisco, California.

IN RE: CALIFORNIA-ORIENTAL STEAM-  
SHIP COMPANY vs. NORSK HYDRO  
ELEKTRISK KVAELSTOF AKTIESEL-  
SKAB.

Gentlemen:

As you know, we have stipulated that the vessel which is the subject matter of the above litigation shall not be sent by the defendants from this port within twenty days from the 22d of this month. As we understand it, this time was desired by you in order that you might have an opportunity to obtain a preliminary injunction forbidding her removal from this port during the pendency of the litigation.

We desire to say that we must insist upon your application for a preliminary injunction being made immediately so that, if application is made, it may be heard and determined before the expiration of the twenty days mentioned. Our reason for doing this is twofold; we are unwilling, because of the very heavy expense and loss involved, to hold the boat here idle for longer than the stipulated time. In addition to this, Mr. Ericksen, the representative of the Norsk Hydro Elektrisk Kvaelstof Aktieselskab Company, is now here and it is necessary for him to return to Norway at the earliest possible moment. His presence here in connection with resisting any application for an injunction is necessary and he is

remaining for that purpose alone. He cannot remain [43] longer than the twenty days stipulated for, and unless your application is made within such time as to allow us reasonable time before his departure for the preparation of the papers in resistance, we will be compelled to ask for a denial of the application upon that ground.

Yours very truly,

(Signed) McCUTCHEN, OLNEY, WIL-  
LARD, MANNON & GREENE. [44]

AFFIDAVIT IN RESISTANCE OF PETITION  
FOR APPOINTMENT OF RECEIVER AND  
FOR AN INJUNCTION PENDENTE LITE.

State of California,

City and County of San Francisco.—ss.

H. J. Hammer, being first duly sworn, deposes and says: That he is the master of the steamship “Pacifico” mentioned in the complaint in the above-entitled action, and has been such master ever since the 3d day of November, 1920. That he became such master immediately upon the said vessel being registered under the Norwegian flag with one A. Mathiesen as owner thereof. That as such master he has at all times since on or about said 3d day of November, 1920, been in the exclusive and immediate possession of said vessel. That he was put in possession of said vessel as her master by the firm of Pinkney and Company. That at the time he became master of said vessel he was instructed by said firm to obey [45] and follow all orders and instructions delivered to him by one C. Henry Smith. That he did so follow all orders and instructions delivered



to him by said Smith until after such time as the registered ownership of said vessel was transferred to one Bjarne Eriksen, whereupon, by reason of said transfer, and under instructions received by him from said Smith, he thereafter followed the orders and instructions of said Eriksen. That he has at no time obeyed or followed the orders of any one other than said A. Mathiesen, C. Henry Smith and Bjarne Eriksen with relation to said vessel. That he has at no time received any instructions whatsoever from the plaintiff in the above-entitled action, and that affiant never heard of the plaintiff or was aware of its existence until on or about the 31st day of May, 1921, when the plaintiff filed a libel in the First Division of the above-entitled court seeking to recover from the affiant, as one of the respondents named in said libel, the possession of said vessel.

H. J. HAMMER. [46]

AFFIDAVIT IN RESISTANCE OF PETITION  
FOR APPOINTMENT OF RECEIVER AND  
FOR AN INJUNCTION PENDENTE LITE.

State of California,

City and County of San Francisco,—ss.

C. Henry Smith, being first duly sworn, deposes and says: That from the organization of the plaintiff corporation until on or about the 21st day of April, 1921, affiant was the General Manager of the plaintiff. That he was, and is, thoroughly acquainted with its affairs and with its financial condition. That the plaintiff has no assets whatever except a possible beneficial interest in certain claims against certain insurance companies for an aggre-

gate amount of \$145,000.00, the legal title to which claims is in the Bank of Italy which claims to be the beneficial owner thereof as well. That the plaintiff is wholly unable to respond to any judgment against it.

That on or about the 9th day of October, 1920, affiant and certain other individuals agreed to associate themselves together in a corporation to be organized under the laws of the Kingdom of Norway for the purpose of purchasing from her then Japanese owners the steamship "Pacifico" mentioned in the complaint in the above-entitled action. That for the purposes of convenience, it was agreed by affiant and said individuals to use the plaintiff as a temporary organization representing their association together in the enterprise of purchasing and owning said vessel, but that plaintiff itself was not to have any interest in said vessel. That said individuals agreed to contribute sixty thousand (60,000) dollars toward the purchase price of said vessel. That the purchase price of said vessel was £98,154—sterling, which at the then prevailing rate of [47] exchange was the equivalent of approximately \$338,753.00. That in addition to the purchase price of the vessel proper, there was also payable to her Japanese owners for stores and materials upon her approximately \$10,353.00. That the total purchase price of said vessel, with the stores and materials upon her, was approximately three hundred and fifty thousand (350,000) dollars. That it was agreed between said individuals and affiant that the actual purchasing of the vessel and its operation thereafter

should be done by affiant, and that a portion of the purchase price should or might be obtained by mortgaging the vessel. That affiant did purchase said vessel from her then Japanese owners, but instead of mortgaging said vessel to obtain a portion of the purchase price, he actually paid the full purchase price, to wit, approximately three hundred and fifty thousand (350,000) dollars with his own funds. That thereafter said individuals, through the instrumentality of the plaintiff, paid affiant the sixty thousand (60,000) which they had agreed to contribute toward the purchase price of said vessel as hereinbefore set forth, but that with the exception of said sixty thousand (60,000) dollars, affiant has not been reimbursed and there has not been repaid or tendered to him any part of the purchase price of said vessel so paid by him with his own funds. That the amount of the purchase price for which he has not been reimbursed is approximately two hundred and ninety thousand (290,000) dollars.

That upon the making of said purchase, affiant took possession of said vessel and caused her to be registered under the laws of the Kingdom of Norway in the name of one A. Mathiesen, a citizen and resident of Norway. That affiant remained in possession of said vessel until after she was transferred to [48] the defendants in the above-entitled action as hereinafter alleged. That upon taking possession of said vessel, affiant caused one H. J. Hammer to be appointed her Master, and caused said Hammer to be placed in immediate charge and possession of her. That until said vessel was transferred to the defend-

ants, said Hammer reported exclusively to affiant and said Mathiesen, and followed the order and instructions of affiant with relation to said vessel. That the plaintiff never had possession of said vessel and never gave instructions or orders with relation to her. That said vessel was not operated for or on account of the plaintiff, but affiant himself met and paid all of her operating expenses except such as have been met and paid by the defendants.

That upon the purchase of said vessel as aforesaid, affiant caused said Mathiesen to accept her registered ownership upon the trust that he would hold the same for the account and subject to the order of affiant. That on the 17th day of January, 1921, and for some time prior thereto, affiant was and had been indebted to the corporation defendant, hereinafter for brevity designated as "Norsk Hydro," upon an open account in the sum of approximately one hundred and fifty thousand (150,000) dollars. That said indebtedness had been incurred by affiant for nitrates manufactured by said defendant to be resold by him, or by it delivered to him to be sold for it upon a *del credere* commission. That it had been the custom between said defendant and affiant for the former to deliver nitrates to the latter without requiring payment therefor in advance of delivery, the amount of the purchase price being charged by said defendant against affiant upon said open account. That while affiant was so indebted to said defendant, and prior to the 17th day of [49] January, 1921, said defendant refused to deliver further nitrates to him without payment therefor upon de-



livery, unless he should pay or adequately secure said account. That affiant thereupon, and prior to the 17th day of January, 1921, offered to cause said steamship "Pacifico" to be transferred to said defendant, or its nominee, as security for said account, provided said defendant would thereafter continue to deliver nitrates to him without requiring as a condition thereof the payment of the purchase price therefor, but would allow such price to be charged against him upon said open account. That immediately prior to the 17th day of January, 1921, there was expected to arrive in California a consignment of nitrates shipped by the said defendant to affiant. That said defendant refused to deliver to affiant the shipping documents for said consignment so that he might obtain delivery of the same upon arrival, unless affiant paid for same in advance. That said consignment arrived and was stored and held for the account of said defendant. That the purchase price of said consignment was approximately ninety thousand (90,000) dollars. That thereafter, and prior to the 17th day of January, 1921, said defendant agreed to said offer of affiant, and thereupon, and in performance thereof, and on the 17th day of January, 1921, affiant caused said Mathiesen to transfer said vessel to said defendant by the endorsement and delivery to the latter of the bill of sale therefor, and thereupon said defendant, in consideration therefor, caused said consignment or nitrates hereinbefore last mentioned to be delivered to affiant without payment of the purchase price therefor, charging said purchase price against affiant upon said open account.



That by reason of the matters just hereinbefore set forth, the balance due from affiant to said defendant upon said open account was increased to [50] the sum of approximately two hundred and forty thousand (240,000) dollars. That no part of said balance has been paid.

That affiant did not inform said defendant that the plaintiff or anyone else, other than himself, was the beneficial owner of said vessel, or the owner of any beneficial interest in her, and that so far as affiant is aware, said defendant was not informed by anyone, and did not have either notice or knowledge that anyone other than affiant had or claimed to have any beneficial interest in said vessel. That the individuals heretofore mentioned who contributed the said sixty thousand (60,000) dollars toward the purchase price of said vessel have a beneficial interest in her, but the same is subject to the reimbursement to affiant of the amount of the purchase price of said vessel furnished by him and for which he has not been reimbursed. That the plaintiff has no beneficial interest in said vessel whatever, and no interest of any nature other than such as it may have as the temporary representative or instrumentality of the association of affiant and said individuals who associated themselves with him for the purpose of purchasing said vessel. That the amount of said portion of said purchase price of said vessel is in excess of the amount of the indebtedness of affiant to said defendant, as security for which said bill of sale was endorsed and delivered to said defendant as hereinbefore set out.

That after the receipt of said bill of sale, as aforesaid, and by virtue thereof, said defendant caused the registered ownership of said vessel to be transferred from said Mathiesen to the defendant Eriksen, and thereafter said Eriksen took and received possession of said vessel from affiant. [51]

That neither the plaintiff nor anyone else has tendered or offered to pay affiant the amount of said purchase price which affiant furnished, as aforesaid, from his own funds and for which he has not been reimbursed, or any part thereof.

C. HENRY SMITH. [52]

AFFIDAVIT IN RESISTANCE OF PETITION  
FOR APPOINTMENT OF RECEIVER AND  
FOR AN INJUNCTION PENDENTE LITE.

State of California,

City and County of San Francisco,—ss.

Bjarne Eriksen, being first duly sworn, deposes and says: That he is one of the defendants in the above-entitled action, and is the agent of the other defendant. That in addition to the denials and allegations contained in the answer of the defendants, and which are verified by affiant of his own knowledge, affiant says: That neither the plaintiff nor anyone else has at any time tendered or offered to pay the defendants, or either of them, the portion of the purchase price of the steamship “Pacifico” which C. Henry Smith, on her purchase from her then Japanese owners, furnished from his own funds as alleged in defendant’s answer, and for which he has not been reimbursed, or any part thereof. [53]

That affiant further says:

That the defendant, designated in the complaint as "Norsk Hydro," is a corporation of ample means, that it is perfectly solvent, that it is not financially embarrassed in any manner, that its assets far exceed its liabilities and exceed its liabilities in an amount far in excess of the value of said steamship as alleged in the complaint, and far in excess of the true value thereof, and that it is amply able to respond to any judgment which the plaintiff may obtain in the above-entitled action.

BJARNE ERIKSEN. [54]

Thereafter, and by way of rebuttal, the plaintiff presented the affidavits of O. H. Root, Louis Ferrari and G. W. Bell. That said affidavits, omitting the captions and verifications, read:

**AFFIDAVIT IN SUPPORT OF PETITION FOR  
THE APPOINTMENT OF RECEIVER AND  
FOR INJUNCTION PENDENTE LITE.**

State of California,

City and County of San Francisco,—ss.

O. H. Root, being first duly sworn, deposes and says: That he is a resident of Berkeley, County of Alameda, State of California; that the California & Oriental Steamship Company is a corporation organized and existing under and by virtue of the laws of the State of California; that on the 20th day of January, 1919, affiant was elected a director of said corporation, and has since said date been, and now is, a duly elected and acting director of said corporation; that at a meeting of directors held on the said

20th day of January, 1919, affiant was elected vice-president of said corporation, and has since said date been, and now is, the duly elected and acting vice-president of said corporation.

That on the 9th day of October, 1920, at the hour of 1:00 P. M., a meeting of stockholders of the California & Oriental Steamship Company was regularly held at the office of said Corporation, and the following is a full, true and correct copy of the minutes of the proceedings of said meeting:

“STOCKHOLDERS’ MEETING  
OF THE  
CALIFORNIA & ORIENTAL STEAMSHIP  
COMPANY. [55]

At the Stockholders’ meeting held in San Francisco, this 9th day of October, 1920, at the hour of one o’clock P. M.

C. Henry Smith, President  
and

O. H. Root, Vice-Pres.

being present:

It was decided to purchase the “Taigi Maru” at the price of £18-0-0, Eighteen Pounds Sterling, per deadweight ton; all cash after steamer has been thoroughly inspected and passes the Bureau Veritas requirements, where the steamer is classed. It was built 1919; is 5453 tons deadweight. She is now in a Bristol Channel Port, having been dry-docked and painted and ready for Sea.

It was also decided to place the steamer under Norwegian flag, and the ownership of the steamer

will be in the name of the California & Oriental Steamship Company, with a corresponding owner in Norway, according to law there.

CALIFORNIA & ORIENTAL STEAM-  
SHIP COMPANY.

C. HENRY SMITH,  
President.

O. H. ROOT,  
Vice-President.

G. R. STACK,  
Secretary.”;

that at no other subsequent meeting of the stockholders or directors was any act or action mentioned in said minutes rescinded or modified; that the signatures, “C. Henry Smith, President,” “O. H. Root, Vice-President” and “G. R. Stack, Secretary,” are the genuine signatures of C. Henry Smith, O. H. Root, your affiant, and G. R. Stack, respectively.

That on the 18th day of April, 1921, a meeting of the board of directors of the California & Oriental Steamship Company, a corporation, was held and at said meeting the following communication was received from C. Henry Smith, and that at said meeting the resignation contained in said communication [56] was duly accepted, to wit:

“SEATTLE. SAN FRANCISCO.

All offers subject to goods being unsold upon receipt of reply and to contingencies beyond our control

C. HENRY SMITH.

Cable “CHENRYINC” San Francisco.

Insurance Building,  
Cor. California and Battery Streets,  
San Francisco, U. S. A.



Codes:

Liebers A. B. C.

4th and 5th Edition United States Food Administration License No.

Western Union and Private, Bentley's & Scotts Board of Directors,

California-Oriental S. S. Co.

San Francisco, California.

Dear Sirs:

I herewith tender you my resignation as a member of the Board of Directors of the California-Oriental S. S. Co., said resignation to take effect immediately.

C. HENRY SMITH."

That on the 19th day of April, 1921, at a meeting of the board of directors of the California & Oriental Steamship Company, a corporation, at which said meeting C. Henry Smith was present, the following resolution was offered and unanimously carried, to wit:

"With the unanimous consent of all the Directors of this Corporation, C. Henry Smith, Manager, was directed to send the following telegram to Arthur Mathiesen, corresponding owner, in Kristiania, Norway, to wit:

"Inasmuch as Steamer PACIFICO is owned by California and Oriental Steamship Company, please cable declaration that such is the fact that you are the representative of this Company. (Signed) SMITH";

that thereupon said telegram was sent in code by said

C. Henry Smith, a copy whereof and a translation thereof is as follows, [57] to wit:

“WESTERN UNION  
CABLEGRAM.

SAN FRANCISCO APRIL 20th, 1921.

TIGRAM (ARTHUR MATHIESEN)

KRISTIANIA (NORWAY)

IFCICSCOWR PACIFICO IRFELNUYJP  
CALIFORNIA ALAVKNOJHO SEFBEODVAD  
BIYMEECOGM UKKIBTYTOE IRKAPFUVDA  
UKMUGANILS PEASYMYRUT CYCLO  
SMITH.

(Chg. C. HENRY SMITH)

- 1 Inasmuch as steamer
- 2 Pacifico
- 3 is owned by
- 4 CALIFORNIA
- 5 and Oriental
- 6 Steamship Company please
- 7 cable declaration
- 8 that such
- 9 is the fact
- 10 that you are the
- 11 representative of this
- 12 company”;

that on the 21st day of April, 1921, the said C. Henry Smith exhibited to affiant a telegram which purported to be a reply to the telegram hereinabove set forth, and which said reply was in the words and figures following, to wit:

“COPY OF TELEGRAM.

San Francisco, Cal., April 21st, 1921.

From Tigram Arthur Mathiesen

Kristiania Norway

Translated By ER Checked by ER

Western Union Translation

Bentley's Code

Referring to your telegram just received Pacifico is actually owned by the California and Riental Steamship Company. I am registered owner of the steamer and representative of this company stop Accordance with your instructions bill of sale has been deposited with the Norsk-Hydro Kristiania as secirity for your debts to them. They are entitled to have clean bill of sale at any time transferred to them

TIGRAM.” [58]

That at an adjourned meeting of the board of directors held on the 21st day of April, 1920, at the hour of 2 o'clock P. M., all the directors being present, the following resolution was offered and unanimously adopted:

“BE IT RESOLVED that C. Henry Smith, manager of this Corporation, shall have no power or authority to purchase or sell vessels or to sell or hypothecate any of the assets of this Corporation of whatsoever kind or character, or to enter into or execute oral or written contracts on behalf of this Corporation, or to execute or accept bills, notices, drafts or letters of credit without the consent of the Board of Directors of this Corporation, anything in the Minutes or By-Laws of this Corporation to the contrary notwithstanding.

O. H. ROOT. [59]

AFFIDAVIT IN SUPPORT OF PETITION  
FOR THE APPOINTMENT OF RECEIVER  
AND FOR INJUNCTION PENDENTE  
LITE.

State of California,

City and County of San Francisco,—ss.

Louis Ferrari, being first duly sworn, deposes and says: That he is a director of the California & Oriental Steamship Company, a corporation organized and existing under and by virtue of the laws of the State of California; that Richard Fitzpatrick is secretary of said corporation; that said Richard Fitzpatrick is absent from the city and county of San Francisco, and that affiant during the absence of said Richard Fitzpatrick is acting secretary of said corporation and that all the records of said corporation are in the possession of said affiant; that among the records of said corporation in the possession of said affiant are what purport to be copies of two letters sent by C. Henry Smith, one dated October 23d, 1920, to Chr. Barth, Esq., attorney at law, Christiania, Norway, and which said letter is in the words and figures following, to wit: [60]

“Oct. 23, 1920.

Chr. Barth, Esq.,

Attorney at Law,

Christiania, Norway.

Dear Mr. Barth:—

Referring to my letter of September 25th, I have had, in the meantime, occasion to transfer a steamer to Norwegian flag which was purchased

for friends here from Japanese owners, named the "Taigi Maru" or now named "Pacífico."

Inasmuch as all negotiations were carried on by cable I had to appoint a Corresponding owner in Norway in order to avoid any delay to the boat, and ship-owner, Mr. Arthur H. Mathiesen, Kristiania, has agreed to act as Correspondent for the steamer and I have so advised the Broker, Messrs. Pinkney & Co., Cardiff, and they are therefore, sending the necessary papers to Mr. Mathiesen.

If you will be willing to attend to the matter of incorporating the steamer in a Norwegian Company for the owners here, please send me a cable. I do not know whether your specialty is Admiralty Law, but if you, for any reason, could not handle this matter, probably you could recommend someone to us, by cable. In the meantime, I beg to mention the necessary particulars to follow in this case:

The owners here of the S.S. "PACIFICO" bought the steamer on a cash basis of £18-0-0 per deadweight ton, or £98,154,-0-0, and the capital stock of the company should be one-half of this amount or £49,077-0-0, or the equivalent amount in Norwegian currency.

I presume it will be necessary, according to Norwegian Law, to have at least three Norwegian Directors besides myself as I am an American Citizen, and if you in that case should be willing to stand as one of the Directors, I would name my brother, Prvisor Arthur Smith, Sarpsborg, besides Mr. Arthur H. Mathiesen and I will write him in the matter in the same mail.



The name of the company should be A/S PACIFICO. As to your remuneration, we shall, no doubt, be able to agree on this.

On account of having been obliged to make the necessary arrangements by cable with Mr. Mathiesen who will act as Corresponding Owner for the steamer, we have had no opportunity for drawing up any contract. As the steamer is owned by a company here, it would be necessary for me to have some sort of an agreement with Mr. Mathiesen, and I have offered him a remuneration of Kr. 12,000 per year during the time he is standing as Corresponding Owner and the duties will be principally to engage officers whenever any vacancies occur, to make up returns for taxes from statements that we will furnish him from here covering the earnings and expenses; [61] also to attend to the insurance at rates which are no higher than can be obtained from here. The stock is to be issued in the name of the California & Oriental Steamship Company, San Francisco, California, as this Company is the actual owner of the boat and the shares to be in denominations of Kr. 6,000 or Kr. 12,000.

If there are any other points that have not been fully explained, we can easily do so by cable. In the meantime, remain with kind regards,

Yours very truly,

C. HENRY SMITH.

By \_\_\_\_\_.

CHS:G."

And another letter dated October 25th, 1920, to Mr. Arthur H. Mathiesen, Kristiania, Norway, and

which said letter is in the words and figures following, to wit:

“Oct. 25, 1920.

Mr. Aethur H. Mathiesen,  
Kristiania, Norway.

Dear Sir:—

Referring to your cable today, as per copy enclosed, in which you suggested a limited company be formed according to Norwegian laws, I telegraphed in reply thereto that I had already sent full particulars by mail.

You will appreciate that on account of the limited time I had to take over this boat, I had not made any such arrangement and I am very much obliged to you for accepting the proposition I made, to act as Correspondent for the boat, and I have now written my friend, Advokat Barth, at Kristiania, with regard to this company. I asked Mr. Barth to get in touch with your good self and as I also thought it would be necessary to have a third Director under Norwegian law, I suggested my Brother, Arthur Smith, Sarpborg, who also will call on you in this connection.

I am thankful for the information in your cable that 6/10 of the capital must be owned by Norwegian subjects and I am writing Advokate Barth with regard to this stipulation.

INSURANCE: I beg to confirm cable in which I asked you to cover Kr. 2,000,000 Hull 6% and Interest and Disbursements Kr. 700,000 21¼%. The valuation of the steamer is Kr. 2,600,000, which kindly keep private.

I have cabled London for rates, but so far have not had any reply as they are very particular about which trade the steamer was to operate, so under the circumstances not having anything definite from London, I accepted your rates on the basis as just mentioned. [62]

I also appreciate very much that you have engaged three engineers 750, 575, and 480 respectively and three mates 560, 460 and 350, monthly, which is satisfactory and may say that I had already engaged a Captain through Messrs. Pinkney & Co. on the basis of Kr. 12,000 per year.

**LOAN WITH MORTGAGE IN STEAMER:** I have been in communication with a bank in Norway and also an attorney with regard to a loan and thought possibly you could arrange such a loan with the Skibs-Hyuotheek Bank for one-half of the valuation, basis Kr. 2,600,000 and I shall be glad to hear on what terms such a loan can be obtained and particularly at what rate of interest.

Messrs. Pinkney & Co. will be sending you the papers after he has made transfer and may say that the transfer will be delayed a couple of days on account of the London bills for the balance of the payment being mailed by our Bank from New York instead of being telegraphed, but presume that these bills will arrive there not later than Thursday of this week.

Yours very truly,

C. HENRY SMITH.

By \_\_\_\_\_.

CHS:G.

ENCS.”

That affiant has been informed by C. Henry Smith, formerly president of said corporation, that said copies are true and correct copies of letters which he sent on the dates which said letters bear respectively to Chr. Barth and to Mr. Arthur Mathiesen.

LOUIS FERRARI. [63]

AFFIDAVIT IN SUPPORT OF APPOINT-  
MENT OF RECEIVER AND INJUNCTION  
PENDENTE LITE.

State of California,

City and County of San Francisco,—ss.

G. W. Bell, being first duly sworn, deposes and says: That he is one of the attorneys for said plaintiff. That he has read the affidavits filed herein on August 8th, 1921, and the answer of defendants to the bill herein.

That on May 31st, 1921, plaintiff herein did file a libel to determine the right to possession of said vessel in the First Division of this court, in admiralty, a copy of which libel is attached to the affidavit of S. H. Derby. That on the filing of said libel against the steamship “Pacifico” and against C. Henry Smith and H. J. Hammer, the return day of process and the day for proclamation was fixed, according to the usual practice of said court in admiralty matters, for and as June 14th, 1921. That on that day plaintiff was ready to enter the default of all parties and persons, but was re-



requested by Mr. F. P. Griffiths, of the firm of McCutchen, Olney, Willard, Mannon & Greene, to allow said proclamation to be continued to June 23d, 1921, and to extend such amount of time for C. Henry Smith and H. J. Hammer to appear and plead. That said matter was again on June 23d, 1921, continued at the request of said F. P. Griffiths to June 27th, 1921, and on that day C. Henry Smith and H. J. Hammer appeared and filed claim to said vessel and answered said libel. That a copy of said answer is hereunto annexed as Exhibit "A." That at the same time said libelant was requested by said F. P. Griffiths not to enter the default of Norsk Hydro Electrisk Kvalstof Aktieselskab, a corporation, as a [64] representative of that corporation was on his way from Norway. That libelant on said day caused the default of all persons other than C. Henry Smith, H. J. Hammer and said Norsk Hydro to be entered, but acting solely on said request, refrained from entering default of said Norsk Hydro. That on July 7th, 1921, said F. P. Griffiths advised affiant that such Norwegian representative had arrived in San Francisco. That on July 9th, 1921, affiant was advised by said S. H. Derby that he had been retained to represent said Norsk Hydro and its representative who had just arrived in San Francisco, and that the firm of McCutchen, Olney, Willard, Mannon & Greene would also set for them except in so far as the interests of said defendants and C. Henry Smith, whom said firm represented, might be in conflict. That on July 11th, 1921, a conference was held with the possibility in view of



amicable settlement of said matter, at which conference were present said F. P. Griffiths, S. H. Derby, Bjarne Eriksen, the representative of said Norsk Hydro, Louis Ferrari, Richard Fitzpatrick and affiant, and another gentleman who appeared to be associated with said Bjarne Eriksen. That no settlement of said matter was reached at said meeting. That thereupon plaintiff's attorneys prepared the bill of complaint herein on file, and filed the same on July 16th, 1921. That process in said proceeding was served on the defendants herein by the United States marshal on July 18th, 1921.

That on July 11th, 1921, defendants herein filed their claim to said vessel, in said admiralty proceeding, and their answer to the libel therein, with certain interrogatories attached. That on July 16th, 1921, defendants herein filed a motion in said admiralty proceeding to release the attachment of said vessel therein and to try the jurisdiction of said Court, sitting in [65] admiralty, in the premises, and said motion was summarily set for hearing on July 19th, 1921. That on July 18th, 1921, plaintiff's attorneys filed exceptions to the interrogatories attached to said answer to said libel. That on July 19th, 1921, said motion in said admiralty proceeding came on for hearing, but as there was no judge of said court to hear it, the same was continued.

That as said bill in equity had been filed in this court and seemed to present the issues involved in said admiralty proceeding, and as some doubt existed as to the jurisdiction of said admiralty court to consider equitable titles in determining the right

to the possession of said vessel, it was mutually agreed between the attorneys for plaintiff herein and attorneys for defendants herein, to use the language of a letter from defendants' attorneys to plaintiff's attorneys, under date of July 22d, 1921, as follows:

"Gentlemen:

Re: California & Oriental Steamship Co.

vs. Steamship Pacifico.

In consideration of your dismissing your libel in the above cause, we hereby give you our assurance on behalf of ourselves and our clients that the steamer 'Pacifico' will not sail from this port for at least twenty (20) days from this date and also that our clients will during that time make no transfer or mortgage of said vessel.

Kindly execute the enclosed dismissal of the libel in pursuance of our understanding as above expressed.

Very truly yours."

That said time of 20 days was fixed upon as the minimum time within which said vessel would be physically able to depart from this port.

That thereupon, on July 23d, 1921, the dismissal referred to in said letter was signed by the attorneys for plaintiff and the attorneys for defendants, and filed and said libel was [66] dismissed, and said vessel released from the custody of the United States Marshal.

That on Saturday, August 6th, 1921, the answer of defendants to the bill of complaint herein was served upon plaintiff's attorneys and filed.

That on Saturday, August 6th, plaintiff filed herein its petition for the appointment of a receiver and for an injunction *pendente lite*, and obtained an order to defendants to appeal on Monday, August 8th, 1921, and show cause why the relief therein prayed for should not be granted.

That said agreed twenty (20) days will not expire until August 12th. That plaintiff and its attorneys have at all times been diligent in said matter, and have voluntarily extended time to defendants at their request in said admiralty libel, as aforesaid, and have not delayed or endeavored to delay this proceeding in any way or manner whatsoever. That the only reason that plaintiff requested this Court for a continuance from August 8th, 1921, to August 9th, 1921, was for the purpose of procuring affidavits to meet the affidavits served by defendants on August 8th, 1921, and the answer served by defendants on Saturday afternoon, August 6th, 1921, and in particular the affidavit of C. Henry Smith.

That upon the arrival of said steamer in San Francisco in the month of May, 1921, the freight moneys earned by said vessel on her voyage to San Francisco were collected and the disbursements for said vessel, including the payment of the master and crew and all other usual expenses, by and through Mr. Richard Fitzpatrick, Secretary of plaintiff corporation, as said master was informed and well knew. That said vessel has always been in the possession of plaintiff corporation, as affiant is informed and verily believes. [67]

That although affiant has made diligent search and inquiry, he has been able to find no law of the Kingdom of Norway prohibiting or penalizing in any way a transfer of a vessel under Norwegian registry under decree of a court of the United States of America directed to the person in whose name such register stands, after such person has been served with the process of such court within its territorial jurisdiction, in which such vessel is also located, and affiant believes and alleges that no such law exists in the Kingdom of Norway. And affiant further alleges, in information and belief, that upon the decree of this court ordering defendants or a commissioner appointed by this court for the purpose, to transfer said vessel to plaintiff or to some person by plaintiff designated, the Government of Norway would merely authorize and instruct the Norwegian Consul at this port to remove the Norwegian lettering and numbering and the Norwegian flag from said vessel and cancel her Norwegian registry, whereupon she could be registered under the laws of such jurisdiction as plaintiff might desire to register her under.

(Signed) G. W. BELL. [68]

**Exhibit "A."**

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY—No. 17,231.

THE CALIFORNIA & ORIENTAL STEAMSHIP CO., a Corporation,

Libelant,

vs.

Norwegian Steamship "PACIFICO," Her Engines, Boilers, Tackle and Furniture, H. J. HAMMER and C. HENRY SMITH.

Respondents.

H. J. HAMMER and C. HENRY SMITH,  
Claimants.

**Answer of Respondents and Claimants H. J. Hammer and C. Henry Smith.**

To the Honorable M. T. DOOLING, Judge of the Above-entitled Court:

Come now H. J. Hammer and C. Henry Smith, respondents and claimants herein, and answer the libel as follows:

**I.**

Deny that possession of the said steamship is or at any time has been wrongfully withheld from the said libelant by the said H. J. Hammer and C. Henry Smith, or by the said H. J. Hammer or by C. Henry Smith on an alleged ground of title to the possession of said vessel, or that possession of



said steamship is or ever has been wrongfully withheld by them or either of them [69] in any way or at all. Deny that the claim of title to the possession of said vessel of the said H. J. Hammer and the said C. Henry Smith or of either of them is entirely or at all false and invalid or false or invalid.

II.

Deny that all and singular or all or singular the premises are true.

WHEREFORE, said respondents and claimants pray that said libel be dismissed and that they do have their costs herein incurred and such other relief as may be proper in the premises.

FARNHAM P. GRIFFITHS.

McCUTCHEN, WILLARD, MANNON &  
GREENE,

Proctors for Claimants and Respondents.

State of California,  
City and County of San Francisco,—ss.

H. J. Hammer, being first duly sworn, deposes and says that he is one of the respondents named in the libel herein and in the foregoing answer thereto; that he has read said answer and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon his information or belief and that as to those matters he believes it to be true.

H. J. HAMMER.

Subscribed and sworn to before me this 25th day of July, 1921.

[Seal]

JAMES MASON,  
Notary Public in and for the City and County of  
San Francisco, State of California. [70]

That thereupon the defendants offered and there was received in evidence a publication purporting to be published at Christiania, Norway, and entitled, "Collection of Norwegian Laws Published for the Use of the Legations and Consulates, 1916-1920." (It is hereby stipulated that said publication may be transmitted to the Appellate Court as an original exhibit.)

That thereupon it was stipulated that the A. Mathiesen mentioned in the pleadings and affidavits had, on or about the 24th day of June, 1921, written a letter to the Bank of Italy, and that said letter had been received by said bank in due course of mail, and in evidence of the contents of said letter the defendants offered in evidence, without objection on the part of the plaintiff, a copy thereof, admitted by plaintiff to be a true copy, and admitted by the defendants to be a copy delivered by said A. Mathiesen to the defendant Norsk Hydro Elektrisk Kvaelstof Aktieselskab, and said copy reads:

Kristiania, 24th June, 1921.

Bank of Italy,

San Francisco.

Dear Sirs:

I have today received the copies from you of your telegrams of the 2nd and 3rd inst. and beg for the

sake of order to send you herewith copies of my telegrams of the 7th and 10th inst.

As you may have been able to understand it was exclusively at the request of Mr. Smith in his telegram of the 20th April reading: "Inasmuch steamer Pacifico is owned California and Oriental Steamship Co. please cable declaration that such is [71] the fact that you are the representative of this company"; that on the following day I acknowledged his notification. I found it, however, at the same time expedient to make a mention of the fact that, according to his instructions, the Bill of Sale which in due course had been received by me had on the 21st January, 1921, been deposited in original with The Norsk Hydro Elektrisk Kvaelfstofaktieselskap (endorsed in blank).

Under contract of the 11th October 1920 S/S "Pacifico" was sold by Uchida Kisen Kabushiki Kaisha, of Kobe, to Mr. Smith, who requested me to be so kind as to have the vessel transferred to the Norwegian Flag with me as chartered owner. All instructions in connection with this vessel have been given me by Mr. Smith, and also all correspondence been signed by him personally, and as it moreover was he who appointed me it is a matter of course that I had neither right, occasion nor reason to fail to conform with his instructions. On the contrary I was bound to do so. How far Mr. Smith has gone beyond his power is unknown to me, and has nothing to do with me.

On the 13th inst. I received from Norsk Hydro information to the effect that the vessel had under

the Bill of Sale deposited with them on the 21st January been registered as belonging to their advocate, Mr. Bjarne Eriksen, here. I have therefore no longer anything to do with this ship.

Yours faithfully,

(S.) ARTH. H. MATHIESEN.

P. S.—I duly advised Norsk Hydro of the contents of your telegrams.

Bilag

100

E San Fredrikshold [72]

### **Testimony of J. H. Hammer, for Defendants.**

That thereafter J. H. HAMMER was called as a witness on behalf of the defendants and testified as follows:

Mr. OLNEY.—Q. Captain Hammer, are you the captain of the steamship “Pacifico”? A. Yes, sir.

Q. How long have you been captain?

A. Since the 3d of November, last year.

Q. You were in command of her when she arrived in this port last May? A. Yes, sir.

Q. At what time did she arrive?

A. The 24th of May.

Q. How was the crew paid off?

A. They got their money, all that was coming to them up to the 25th of May.

Q. Who paid them?

A. The first time it was paid by Mr. Ferrari and Mr. Blake, I think; they came on board with the money on the 25th of May.

Q. Mr. Ferrari, of the Bank of Italy?

(Testimony of J. H. Hammer.)

A. Yes, sir.

Mr. OLNEY.—Mr. Ferrari, it will be admitted that you are a director of the Bank of Italy?

Mr. FERRARI.—Yes, and also a director of the California & Oriental Steamship Company.

Mr. OLNEY.—Q. Mr. Blake is in C. Henry Smith's office? A. Yes, sir.

Q. Was anything said to you at that time about the California & Oriental Steamship Company?

A. No, I don't think so.

Q. Who collected the freight money, so far as you know?

A. I don't know who collected it. So far as I know, the Bank of Italy collected the freight money. That is what I heard.

Q. You don't know anything about that of your own knowledge, do you? A. No. [73]

Q. When did you first learn that the California & Oriental Steamship Company claimed any interest in this boat?

A. I think that was on the boat, on the 31st of May, when they put the Marshal on board.

#### Cross-examination.

Mr. BELL.—Q. Captain Hammer, prior to that time who did you think was the owner of the vessel? A. Mr. Smith.

Q. Mr. C. Henry Smith? A. Yes, sir.

Q. You didn't know anything about the Norsk Hydro being the owner, did you?

A. No, not at that time.



(Testimony of J. H. Hammer.)

At the request of counsel for the plaintiff, counsel for the defendants also made a stipulation in open court in the following words:

“In the office of C. Henry Smith were kept the accounts of himself and the California & Oriental Steamship Company, and another company, I believe; that in these accounts, and apparently as a personal account of his, appeared, up to February of this year, an account or a sheet entitled “*Pacifico*,” showing the disbursements by Mr. Smith on account of that vessel, and showing a payment by him of the purchase price, and showing also the receipt by him of the approximately \$60,000 that was paid in on account of the purchase price. In February, 1921, that account was changed by writing the name California & Oriental Steamship Company above it. That was done by Mr. Blake after a talk with Mr. C. Henry Smith. Mr. Blake is the bookkeeper.”

That thereupon the matter was argued and submitted for decision, and thereafter, and on the 12th day of August, 1921, said [74] court in open court orally rendered its decision granting plaintiff's petition for a receiver, and on August 15, 1921, made its written order appointing Captain John Leale receiver of the steamship “*Pacifico*,” her engines, etc.

Dated: August 18, 1921.

McCUTCHEN, OLNEY, WILLARD, MAN-  
NON & GREENE,

McCLANAHAN & DERBY,

Attorneys for Defendants.

BELL, BROOKMAN, SIMMONS, &  
CREECH,

LOUIS FERRARI,

Attorneys for Plaintiff.

The foregoing agreed statement of the case is approved, and IT IS HEREBY ORDERED that the publication therein mentioned be transmitted to the Appellate Court as an original exhibit, as stipulated.

Dated: Aug. 23d, 1921.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Aug. 23, 1921. W. B. Mal-  
ling, Clerk. By J. A. Schaertzer, Deputy Clerk.  
[75]

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In the Southern Division of the District Court of  
the United States for the Northern District of  
California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAMSHIP  
CO., a Corporation,

Plaintiff,

vs.

NORSK HYDRO ELEKTRISK KVAELSTOF  
AKTIESELSKAB, a Corporation, and  
BJARNE ERIKSEN, an Individual,  
Defendants.

**Petition for Allowance of Appeal.**

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB, a corporation, and BJARNE ERIKSEN, defendants in the above-entitled action, feeling aggrieved by the decision of the court in said action and the order entered herein on the 15th day of August, 1921, wherein and whereby Captain John Leale was appointed receiver of the Steamship "Pacifico," her engines, boilers, tackle, apparel, and furniture, etc., comes now by its undersigned attorneys and petitions said court for an order allowing said defendants to prosecute an appeal to the Honorable The United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States, in that behalf made and provided, and also that an order be made fixing the amount of the cost bond, which said defendants shall give and furnish upon said appeal.

And your petitioners will ever pray.

McCUTCHEN, OLNEY, WILLARD, MAN-  
NON & GREENE,

McCLANAHAN & DERBY,

Attorneys for Defendants. [76]

Service of the within Petition and receipt of a copy is hereby admitted this 23d day of August, 1921.

LOUIS FERRARI,  
BELL, BROOKMAN, SIMMONS &  
CREECH,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 23, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [77]

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In the Southern Division of the District Court of  
the United States for the Northern District of  
California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAMSHIP  
CO., a Corporation,

Plaintiff,

vs.

NORSK HYDRO ELEKTRISK KVAELSTOF  
AKTIESELSKAB, a Corporation, and  
BJARNE ERIKSEN, an Individual,  
Defendants.

**Assignment of Errors.**

Come now the defendants above named and make  
and file the following assignment of errors upon  
which they will rely in the prosecution of their  
appeal in the above-entitled cause.

I.

That the Court erred in making and entering its  
order on August 15th, 1921, appointing a receiver  
for the steamer "Pacífico" and enjoining defendants  
from interference with said receiver and the pro-  
perty in his charge.

II.

That the Court erred in appointing a receiver for  
the steamer "Pacífico" for the reason that, on the  
showing made by plaintiff and defendants, such ap-

pointment was unjustified and an abuse of the Court's discretion.

### III.

That the Court erred in appointing a receiver in [78] view of the showing made by defendants that the transfer of the steamer "Pacifico" to them was made in good faith and for value and without notice on their part of any interest held by plaintiff in said steamer or any notice or knowledge of any facts or circumstances which would have put a reasonable man upon inquiry and in that plaintiff's denials on this point were based solely on information and belief.

### IV.

That the Court erred in appointing a receiver in view of the uncontradicted showing made by defendants in the third separate defense set up in their answer, which showing was also supplemented by specific affidavits.

### V.

That the Court erred in appointing a receiver in that under the law of Norway as set up in the fourth separate defense of defendants' answer and proved at the hearing the plaintiff could not be legally or beneficially interested in the steamer "Pacifico" and the defendants could not transfer either the registered or beneficial ownership to plaintiff without being guilty of a violation of said laws of Norway and subjecting themselves to fine and imprisonment and said steamer to forfeiture, and in that plaintiffs denials of the existence of such laws were based on information and belief.



VI.

That the Court erred in appointing a receiver in that plaintiff was guilty of laches in applying for such appointment.

VII.

That the Court erred in appointing a receiver [79] in that the grounds for requesting such appointment, as shown by the whole record, were wholly without equity.

Wherefore, said defendants pray that the said order of the above-entitled court appointing Captain John Leale receiver herein be reversed.

McCUTCHEN, OLNEY, WILLARD, MAN-  
NON & GREENE,  
McCLANAHAN & DERBY,

Attorneys for said Defendants.

Dated San Francisco, Cal., August 23d, 1921.

Service of the within assignment of errors and receipt of a copy is hereby admitted this 23d day of August, 1921.

LOUIS FERRARI,  
BELL, BROOKMAN, SIMMONS &  
CREECH,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 23, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [80]

In the Southern Division of the District Court of  
the United States for the Northern District of  
California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAM-  
SHIP Co., a Corporation,

Plaintiff,

vs.

NORSK HYDRO ELEKTRISK KVAELSTOF  
AKTIESELSKAB, a Corporation, and  
BJARNE ERIKSEN, an Individual,  
Defendants.

**Order Allowing Appeal and Fixing Amount of Cost  
Bond.**

Upon motion of the attorneys for defendants in  
the above-entitled action, and upon filing a petition  
for the allowance of an appeal and an assignment  
of errors,—

IT IS ORDERED that the said appeal be, and  
it is hereby allowed to have reviewed in the United  
States Circuit Court of Appeals for the Ninth Cir-  
cuit, the order heretofore made and entered herein  
on the 15th day of August, 1921, appointing Cap-  
tain John Leale, receiver of the steamship “Pa-  
cifico,” her engines, boilers, tackle, apparel and fur-  
niture, etc.

IT IS FURTHER ORDERED that said defend-  
ants shall file its undertaking and cost bond in the  
sum of \$500 dollars.

WM. C. VAN FLEET,  
District Judge.

[Endorsed]: Filed Aug. 23, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [81]

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In the Southern Division of the District Court of  
the United States for the Northern District of  
California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAM-  
SHIP CO., a Corporation,

Plaintiff,

vs.

NORSK HYDRO ELEKTRISK KVAELSTOF  
AKTIESELSKAB, a Corporation, and  
BJARNE ERIKSEN, an Individual,  
Defendants.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That the undersigned, American Surety Company  
of New York, a corporation duly organized and  
existing under and by virtue of the laws of the  
State of New York, duly authorized to transact a  
surety business in the State of California, and fully  
qualified before the Department of Justice to exe-  
cute bonds and undertakings in any and all Federal  
Courts in the United States of America, is held  
and firmly bound unto The California & Oriental  
Steamship Co., a corporation, plaintiff in the above-  
entitled action, in the full and just sum of two  
hundred and fifty (250) dollars, lawful money of

the United States, to be paid to said plaintiff, The California & Oriental Steamship Co., a corporation, to which payment well and truly to be made we bind ourselves, our successors, representatives and assigns, firmly by these presents. [82]

Sealed with our seals and dated this 23d day of August, 1921.

WHEREAS, the above-named defendants, Norsk Hydro Elektrisk Kvaelstof Aktieselskab, a corporation, and Bjarne Eriksen, have obtained from the District Court of the United States, for the Northern District of California, Southern Division, its order allowing said defendants to appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit, to reverse the order made and entered in the above-entitled action on the 15th day of August, 1921, wherein and whereby Captain John Leale was appointed receiver of the steamship "Pacífico," her engines, boilers, tackle, apparel and furniture, etc.,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named defendants, Norsk Hydro Elektrisk Kvaelstof Aktieselskab, a corporation, and Bjarne Eriksen, shall prosecute such appeal to effect and answer all costs if they shall fail to make good such plea, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, American Surety Company of New York, a corporation, has hereunto caused its corporate name to be signed and attested, and its corporate seal to be affixed by its duly au-

thorized officers, at San Francisco, California, this 23d day of August, 1921.

AMERICAN SURETY COMPANY OF  
NEW YORK,

By R. D. WELDON,  
Resident Vice-president.

[Seal] Attest: E. C. MILLER,  
Resident, Assistant Secretary. [83]

The foregoing bond is hereby approved as to form this 23d day of August, 1921.

LOUIS FERRARI,  
BELL, BROOKMAN, SIMMONS &  
CREECH,

Attorneys for Plaintiff.

State of California,  
City and County of San Francisco.

On this 22d day of August, in the year one thousand nine hundred and twenty-one, before me, John McCallan, a notary public in and for said city and county, state aforesaid, residing therein, duly commissioned and sworn, personally appeared R. D. Weldon and E. C. Miller, known to me to be the resident vice-president and resident assistant secretary respectively of the American Surety Company of New York, the corporation described in and that executed the within and foregoing instrument, and known to me to be the persons who executed the said instrument on behalf of the said corporation, and they both duly acknowledged to me that said corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said



city and county of San Francisco, the day and year  
in this certificate first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of  
San Francisco, State of California.

My commission expires 4/12/25. [84]

Approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Aug. 23, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [85]

In the Southern Division of the District Court of  
the United States for the Northern District of  
California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAM-SHIP Co., a Corporation,

Plaintiff,

VS.

NORSK HYDRO ELEKTRISK KVAELSTOF  
AKTIESELSKAB, a Corporation, and  
BJARNE ERIKSEN, an Individual,  
Defendants.

### Praeceptum for Transcript of Record.

The clerk of the above-entitled court will please prepare a transcript of the record for the Circuit Court of Appeals in the above-entitled matter, and is hereby directed to insert therein the following:

(1) The agreed statement of case for use on appeal, made and entered into on the 18th day of August, 1921, and on file herein.

(2) The order of the above-entitled court appointing receiver, made and entered herein on the 15th day of August, 1921.

(3) Petition for allowance of appeal;

Order allowing appeal;

Assignment of errors;

Bond on appeal; Citation.

Dated San Francisco, California, this 23d day of August, 1921.

McCUTCHEN, OLNEY, WILLARD, MAN-  
NON & GREENE,

McCLANAHAN & DERBY,

Attorneys for Defendants. [86]

Service of the within praecipe and receipt of a copy is hereby admitted this 23d day of August, 1921.

LOUIS FERRARI,

BELL, BROOKMAN, SIMMONS &  
CREECH,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug, 4, 1921. W. B. Maling,  
Clerk. By J. A. Schaertzer, Deputy Clerk. [87]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

IN EQUITY—No. 632.

THE CALIFORNIA & ORIENTAL STEAM-SHIP Co., a Corporation,

Plaintiff,

vs.

NORSK HYDRO ELEKTRISK KVAELSTOF  
AKTIESELSKAB, a Corporation, and  
BJARNE ERIKSEN, an Individual,  
Defendants.

**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing eighty-seven (87) pages, numbered from 1 to 87, inclusive, to be full, true and correct copies of the record and proceedings in the above-entitled cause, as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the office of the clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$36.90; that said amount was paid by the defendants; and that the original Citation issued in said cause is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 26th day of August, A. D. 1921.

[Seal] WALTER B. MALING,  
Clerk United States District Court for the Northern  
District of California. [88]

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### **Citation on Appeal.**

UNITED STATES OF AMERICA,—ss.

The President of the United States, to The California & Oriental Steamship Co., a Corporation, and to Messrs. Bell, Brookman, Simmons & Creech and Louis Ferrari, Attorneys for Said Plaintiff, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein the defendants herein, Norsk Hydro Elektrisk Kvaelstof Aktieselskab, a corporation, and Bjarne Eriksen, are appellants, and you are appellee, to show cause, if any there be, why the order rendered, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 23d day of August, A. D. 1921.

WM. C. VAN FLEET,  
United States District Judge.

Service of the within citation and receipt of a copy is hereby admitted this 24th day of August, 1921.

LOUIS FERRARI,  
BELL, BROOKMAN, SIMMONS &  
CREECH,  
Attorneys for Plaintiff, The California & Oriental  
Steamship Company, a Corporation.

[Endorsed]: No. 632. In the Southern Division of the United States District Court for the Northern District of California, Second Division. In Equity. The California & Oriental Steamship Company, a Corporation, Plaintiff, vs. Norsk Hydro Elektrisk Kaelstof Antieselskab, a Corporation, and Bjarne Eriksen, an Individual, Defendants. Citation on Appeal. Filed Aug. 24, 1921. W. B. Mal-  
ing, Clerk. By J. A. Schaertzer, Deputy Clerk. [89]

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[Endorsed]: No. 3758. United States Circuit Court of Appeals for the Ninth Circuit. Norsk Hydro Elektrisk Kvaelstof Aktieselskab, a Corporation, and Bjarne Eriksen, Appellants, vs. The California & Oriental Steamship Company, a Corporation, Appellee. Transcript of Record. Upon



Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed August 26, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



No. 3758

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

8

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB  
(a corporation) and BJARNE ERIKSEN (an individual),

*Appellants,*

vs.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY  
(a corporation),

*Appellee.*

## BRIEF FOR APPELLANTS.

McCutchen, Olney, Willard, Mannon & Greene,  
McClanahan & Derby,

*Attorneys for Appellants.*

WARREN OLNEY, JR.,  
*Of Counsel.*

FILED

1 OCT 10 1921

F. D. MONGKTON,  
CLERK



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| <p>The receivership was not asked for on the ground that defendants were preparing to operate the vessel and expose her to loss by perils of the sea, nor on the ground that the removal of the vessel from within the territorial limits of the court's jurisdiction would affect the court's jurisdiction</p>  |      |



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No. 3758

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB  
(a corporation) and BJARNE ERIKSEN (an individual),

*Appellants,*

vs.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY  
(a corporation),

*Appellee.*

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## BRIEF FOR APPELLANTS.

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This is an appeal by the defendants from an order of the District Court appointing, at the instance of the plaintiff, a receiver *pendente lite* to take possession of and operate the Norwegian steamer "Pacifico".

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## Statement of the Case.

The subject-matter of the action is the steamer mentioned. She is registered under the Norwegian flag and her registered owner is the defendant Eriksen, a

citizen and resident of Norway. He, however, holds the title to the vessel only as trustee for the other defendant, a Norwegian corporation, which for brevity we may term the "Norsk Hydro". In other words the two defendants are the registered owner of the vessel and the beneficial owner for whom the registered ownership is held in trust. These defendants were in possession of the vessel.

The object of the action is to establish that the plaintiff is the true beneficial owner of the vessel, and to compel the defendants to transfer her to it as such owner (Tr. pp. 19, 20), the gravamen of the alleged cause of action as set out in the plaintiff's complaint being, that prior to the acquisition of the steamer by the defendant, her registered ownership was held by one Mathiesen in trust for the plaintiff, but that in violation of this trust Mathiesen transferred her registered ownership to the defendant Eriksen, who took the same in trust for the defendant Norsk Hydro, and that such transfer was made without consideration and with notice on the part of both defendants of the plaintiff's alleged right (Tr. pp. 9-19).

The ground, and the only ground, on which the appointment of a receiver *pendente lite* was asked is that, as asserted in the petition for the appointment (Tr. pp. 23-25), the captain of the steamer had, up to July 15, 1921, or only four days before the filing of the complaint, received and followed the instructions of the plaintiff with regard to the vessel, but that since said date had refused to follow such instructions and had followed those of the defendant Norsk Hydro; that as a



result it was impossible for the plaintiff to operate the vessel; that the defendant Norsk Hydro intended to operate her and would, as an incident of such operation, send her to sea and consequently beyond the jurisdiction of the court; that the vessel should be operated to prevent serious loss through depreciation and loss of earnings, and that to protect the rights and interests of those entitled to operate the vessel it was necessary that the court appoint a receiver to take charge of and operate her. In other words, the case for the appointment of a receiver, as stated by the moving papers, was based essentially upon the fact that the plaintiff had been in possession of the vessel, through her captain, up to four days before the commencement of the action, when the plaintiff was dispossessed, so to speak, by the action of the captain in refusing to take further orders from it and taking orders from the defendants.

In this connection it is to be noted that while it is alleged that the defendants, unless prevented, would operate the vessel and as an incident of her operation would send her to sea and consequently beyond the jurisdiction of the court (Tr. p. 24), there is no allegation that the defendants had any intention of failing to comply with any judgment that might be rendered against them, or were intending to send the vessel to sea for the purpose of defeating such a judgment, or for any purpose other than that of operating her so that she might be profitably employed. Nor is it alleged that the defendants are not financially able to answer to the plaintiff for the full value of the vessel and for any earnings they might receive from her op-

eration, or that for any reason a judgment against them would be ineffective or incapable of enforcement whether the vessel were within the territorial limits of the court's jurisdiction or not. For example, while it appears that the defendants are both citizens of Norway, it is not alleged nor is there any showing either that a judgment here would not be recognized or enforced in Norway, or that the defendants have not within the jurisdiction of the court property sufficient to satisfy any judgment against them. It is also to be noted that the action is a purely personal one against the defendants and is not an action *in rem* against the vessel, and that the defendants have appeared and submitted to the jurisdiction of the court, so that the sending of the vessel to sea and her consequent removal from within the territorial limits of the court's jurisdiction would not affect that jurisdiction in the slightest. It is also to be noted that a receiver is not asked for on the ground of any danger to the vessel involved in her being allowed to remain in the possession of the defendants. To be sure the defendants would send her to sea as an incident of her operation, and she would then be exposed to loss through the perils of the sea, but the very function of the receiver and the purpose of his appointment is to operate the vessel and send her to sea and thereby expose her to the very same perils to which she would be exposed if sent to sea by the defendants. So far as danger of loss is concerned, the situation is the same whether it be the defendants or a receiver who operate the vessel.

Summing the matter up, then, the ground on which the appointment of a receiver was asked is not that there was any danger, either that the court would lose jurisdiction, or that its judgment, if it finally gave one against the defendants, would be rendered ineffective or unenforceable, or that there was any danger of the vessel's being lost because of the defendants' operating her which would not exist if she were operated by a receiver, but is, as we have stated, that the plaintiff was in the possession of the vessel up to just before the commencement of the action and was then wrongfully deprived of it, and that under these circumstances the defendants should not be permitted to have the possession and operation of the vessel during the pendency of the litigation, but a receiver should be appointed to have possession of and operate her.

The application for the appointment was heard upon the moving papers, to-wit: the complaint and petition, upon the defendants' answer and certain affidavits on their behalf, upon certain affidavits on behalf of the plaintiff in rebuttal and upon evidence introduced on behalf of the defendants.

The affidavits for the defendants took direct issue with the essential ground upon which the appointment of a receiver was asked for, namely, that the plaintiff had been in possession of the vessel, through her captain, up to four days before the commencement of the action, and had then been wrongfully dispossessed. The discussion of the showing made upon this point more properly comes within the argumentative portion of this brief and will be reserved for it. Suffice it to say

here that, as we believe, it was conclusively shown that the alleged ground did not exist and that the averments of the plaintiff's petition in that respect were untrue. That the ground, and the only ground, upon which a receiver was asked for was conclusively shown to be untrue, is the first reason why we claim the order appointing a receiver to have been erroneous.

The second reason why we claim the order to have been erroneous proceeds upon the well-established rule that the possession of a defendant having the legal title to the subject-matter of the litigation will not be disturbed *pendente lite* by the appointment of a receiver except for the very strongest of reasons, and, in particular, that such a defendant will not be so dispossessed prior to a final determination that his possession is wrongful, unless it clearly appear that the plaintiff will probably prevail in the litigation. Our claim in this case is that it did not appear that the plaintiff would probably prevail, but quite the contrary; that in fact as to at least three of the defenses pleaded the facts were not controverted, and the only possible question is one of law as to whether or not they constitute valid defenses. With this explanation, we proceed to state the defenses pleaded.

The defenses were four in number. The first is a denial that the registered ownership formerly held by Mathiesen was held by him in trust for the plaintiff. If, however, this had been the only issue in the case, the facts appearing in the pleadings and affidavits on both sides are such that we would not be justified in saying positively that the lower court might not reason-

ably conclude that there was a fair probability of the plaintiff establishing that such a trust existed as to Mathiesen in favor of the plaintiff. This defense, therefore, may be dropped from consideration on this appeal.

The second defense is that the defendants did not purchase the vessel and acquire her registered ownership without a valuable consideration and with notice or knowledge of any claim or right on the part of the plaintiff, but quite the contrary; that the real fact is that the defendants were bona fide purchasers for value and without notice, so that they took free of any trust in favor of the plaintiff, if such trust existed. The only evidence, if it may be called evidence at all, that the defendants did not acquire their interest for a valuable consideration and without notice or knowledge of any claim by the plaintiff, is the bare averments of the complaint to that effect. These averments are made upon information and belief only (Tr. pp. 13-16). They are denied under oath, positively and directly (Tr. pp. 29, 30). The plaintiff's affidavits in rebuttal do not support the averments of the complaint. In other words, the situation is that the only averments that the defendants acquired their legal title without a valuable consideration and with notice are made upon information and belief only, and are positively and directly denied. Nor does the plaintiff's proof anywhere set forth any matters showing, or tending to show, either that the transfer of the vessel to the defendants was without a valuable consideration or that it was made with notice or knowledge on their part of the plaintiff's claim. There are facts alleged in the plaintiff's rebuttal



affidavits showing, or tending to show, that one C. Henry Smith, whom the defendants supposed to be the beneficial owner, was acting for the plaintiff, and that Mathiesen, the original holder of the registered title, knew or should have known this fact, and also that one Barth, the attorney in Norway of Smith, knew of the plaintiff's interest; but that the defendants knew of it, or should have known of it, is not anywhere averred except upon information and belief, nor are any facts alleged showing, or tending to show, that the defendants knew, or should have known, of the plaintiff's right, assuming that it had a right. The only possible ground on which it can be contended that anything appears to rebut the positive denials of the defendants that they took with notice, is that it appears, in fact the defendants freely admit, that they purchased the vessel knowing that her registered owner, Mathiesen, held his title in trust, but believing that he held it in trust for the C. Henry Smith mentioned, with whom they were dealing. It may be contended that because the defendants knew that Mathiesen held the registered title in trust, they were put upon inquiry as to whom he held it in trust for, and had to ascertain, at their peril, who was the true beneficiary. This, in fact, as we remember it, was the only response in the lower court by plaintiff's counsel to the contention that because the only averments that the defendants took with notice were upon information and belief, and were positively and directly denied, and the exact contrary affirmed, it had to be taken that the averments were untrue. This contention that one purchasing from a trustee must ascer-

tain at his peril the true beneficiary for whom the trustee holds, presents a pure question of law, and its discussion will be reserved for the argumentative portion of this brief. It is, we believe, the only real question in connection with this defense.

While it is true, as we believe, that the only question in connection with this defense is the question of law just stated, yet it is worthy of note that the defendants set out in detail the circumstances under which the vessel was acquired by them (Tr. pp. 33-37), that their averments in this respect are not controverted and must be taken to be true, and that these circumstances show beyond question that the defendants advanced a valuable consideration for the vessel, and also indicate pretty plainly that the defendants must have done so without any suspicion that anyone except Smith had any claim or right to the vessel. The circumstances of the purchase are such that it is hardly possible that the defendants would have taken the vessel if they had suspected for a moment that any one other than Smith had any interest in her.

The circumstances relative to the purchase of the vessel by the defendants, as detailed by them, are briefly as follows (Tr. pp. 33-37):

In January, 1921, the C. Henry Smith mentioned was indebted to the defendant Norsk Hydro upon an open account in the amount of approximately \$150,000 for nitrates sold him by the Norsk Hydro, or sold by him for it upon a *del credere* commission. It had been the custom between the Norsk Hydro and Smith for the

former to deliver nitrates to the latter without requiring payment for them in advance, but by reason of the large amount owing to it, the Norsk Hydro refused in that month to deliver any more nitrates to Smith without payment therefor on delivery unless his debt to it was paid or adequately secured, and, in particular, refused to deliver to Smith the shipping documents for a consignment of nitrates whose immediate arrival in California was expected. Smith thereupon offered the steamship "Pacifico" as security for his indebtedness, provided the Norsk Hydro would continue to deliver him nitrates without requiring payment in advance. The Norsk Hydro accepted the offer, believing that Smith was the real owner of the vessel, and Smith thereupon caused her registered owner, Mathiesen, to deliver the bill of sale for the vessel to Eriksen, the nominee of the Norsk Hydro, and by virtue of this bill of sale the registered ownership was later transferred to Eriksen. The Norsk Hydro, on its part, on delivery of the bill of sale, caused the delivery to Smith of the shipping documents for the consignment of nitrates mentioned, without payment therefor in advance, thereby increasing the indebtedness of Smith to it by the amount of the price of the nitrates, approximately \$90,000 (Tr. pp. 33-37). In other words, the uncontroverted facts are, in brief, that in consideration of an antecedent indebtedness of \$150,000 due it, and the delivery by it of nitrates whereby an additional indebtedness to it of \$90,000 was incurred, the Norsk Hydro took from the registered owner of the vessel, at the instance of Smith, whom it believed to be the beneficial owner, a bill of

sale for the vessel and had her registered ownership transferred to Eriksen, to be held as security for the total indebtedness of Smith of \$240,000. That there was here a valuable consideration is beyond question, and we will not argue the point. We think it likewise evident that the Norsk Hydro would hardly have engaged in and consummated this transaction if any suspicion whatever had occurred to it that Smith was not the real owner of the vessel.

The third defense is that, even assuming that the defendants are not protected as bona fide holders of the legal title of the vessel for value, and without notice, and stand simply in the shoes of Smith, yet the plaintiff could not recover the vessel from Smith and cannot recover it now from the defendants, who at least stand in his shoes, without first paying, or offering to pay, the sum of \$290,000, which Smith paid from his own personal funds on the price of the vessel upon the original purchase of her, the very purchase under which the plaintiff claims, and which it claims was made by Smith for it. This defense proceeds upon the legal proposition that a person who has himself contributed the funds, or a part of the funds, whereby certain property was acquired, is entitled to be reimbursed by one who claims that the property was in fact purchased for him before the latter can take the property from the one who made the purchase and advanced his own money for that purpose. The particular facts in this connection are averred in the answer upon information and belief, as they were not within the personal knowledge of the defendants, but the averments of the answer are

fully supported by the positive allegations in the affidavit of C. Henry Smith (Tr. pp. 50-53). The allegations in the affidavit are not controverted, and it is to be noted that they are as to matters necessarily within the knowledge of the plaintiff and easily capable of being disproven if untrue. The matters alleged are these:

The steamer was originally a Japanese vessel and was purchased from her Japanese owners for approximately \$350,000 by Smith, who caused her to be transferred to the Norwegian flag and to be registered in the name of Mathiesen as her owner. The plaintiff claims that this purchase was made by Smith for it. Smith declares (Tr. p. 51) that the purchase was in fact made for an association of himself and other individuals who proposed to organize themselves into a Norwegian corporation, and that the plaintiff was used merely as a temporary organization to represent their association and was not to have any real interest in the vessel. But, whatever the fact may be as to the plaintiff having or not having any real interest in the purchase, the uncontroverted facts are that Smith paid from his own funds the full purchase price of the vessel, approximately \$350,000, that certain individuals who had agreed to associate themselves with him in the venture of buying the steamer had agreed to contribute toward her price a total of \$60,000, and after her purchase did contribute this amount through the plaintiff, and that with the exception of this amount Smith has never been reimbursed for any portion of the purchase price and there has been no offer to reimburse him for



it. In other words, even assuming that the purchase was made by Smith for the plaintiff, and that the \$60,000 contributed may be considered as paid by the plaintiff, the situation is that the plaintiff paid but \$60,000 on account of the purchase price, and that Smith paid the balance, or \$290,000, for which he has not been reimbursed, and which is necessarily due him from the plaintiff if the purchase is to be considered as having been made for the latter's account.

It is also to be noted that the uncontroverted fact is that it was agreed at the time of the purchase that a portion of the purchase price might be raised by a mortgage on the vessel (Tr. pp. 51, 52), which was not done, so that Smith stands in the position of one who, authorized to mortgage the vessel in order to raise a portion of the purchase price, himself advances the money instead of raising it by mortgage. It is also to be noted in explanation of Smith's conduct in virtually pledging the vessel to the defendants for his own indebtedness to the Norsk Hydro, that the amount for which he so pledged her was less than the amount which he himself had in the vessel, so to speak, such amounts being \$240,000 and \$290,000, respectively.

As we have said, the foregoing facts are not controverted. The result is that the only question presented by this defense is one of law, viz: do the facts alleged constitute a valid defense? The discussion of that question is reserved for the argumentative portion of the brief.

The fourth defense (Tr. pp. 40-41) is that at the time of the original purchase of the steamer and her

registry under the Norwegian flag, a registry obtained in accordance with the understanding upon which she was purchased (Tr. pp. 58-59), it was, and ever since has been, illegal under the Norwegian law for either the legal or the beneficial ownership of a Norwegian vessel to be held by one, such as the plaintiff, who is not either a citizen of Norway or a Norwegian corporation, and also that it is illegal under the Norwegian law for the legal or beneficial ownership of a Norwegian vessel to be transferred to one who is not a Norwegian citizen, and that the ultimate relief sought in this case—the transfer of the vessel to the plaintiff and the recognition of it as her beneficial owner—cannot legally be made by the laws of Norway, to which the vessel is subject, and cannot be made without subjecting the vessel itself to forfeiture under the Norwegian laws, and the defendants to liability to fine and imprisonment.

The positive averments of the answer as to the Norwegian law are not controverted, save that G. W. Bell, one of the attorneys for the plaintiff, states in his affidavit that he has searched and has been unable to find any Norwegian law prohibiting or penalizing the transfer of a Norwegian vessel under a decree of a court of the United States (Tr. p. 73). If by this is meant that there is no law of Norway which in express terms forbids the transfer of a Norwegian vessel *under a decree of a court of the United States*, we have no doubt the affidavit is true; it would be most remarkable indeed if such a statute existed. But, if the affidavit means anything more than this, it was conclusively shown not to be correct. There was introduced in evidence (Tr.

p. 76) a collection of Norwegian laws published for the use of Legations and Consulates wherein appear the Norwegian statutes with relation to shipping. These statutes prescribe that Norwegian vessels must be owned by Norwegian subjects, and may not be transferred to any one who is not a Norwegian subject without special permission had from the government, and that any transfer in contravention of this prohibition will subject the parties to it to fine and imprisonment and the vessel to forfeiture. A transfer to the plaintiff of the vessel which is the subject of the present controversy would be just such a transfer as the Norwegian statute prohibits and was manifestly designed to prevent, and this is true whether the transfer be made pursuant to a decree of a foreign court or not.

The Norwegian statutes upon which we rely are printed later in this brief.

In addition to the foregoing matters, there is a further fact or situation which should be stated as going most strongly to the proper exercise by the court of its discretion in appointing a receiver. The fact or situation is that not only is there no averment that the defendants are not able to respond fully and completely to any judgment against them, even though such judgment should be for the full value of the vessel plus her earnings, but it is positively and affirmatively averred on behalf of the defendants, and not denied, that, on the one hand, the plaintiff is financially irresponsible and wholly unable to respond to any judgment against it (Tr. pp. 50, 51), and on the other hand, that the real defendant, the Norsk Hydro, is a corporation of ample

means, not financially embarrassed in any way, with assets exceeding its liabilities far in excess of the value of the steamer, and amply able to respond to any judgment which the plaintiff might obtain (Tr. p. 57).

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### Argument.

As a preliminary to the discussion of the particular points involved, we would state certain fundamental rules governing the appointment of receivers *pendente lite*. We state them, not for purposes of discussion, for they are not open to discussion, but because they are the foundations upon which our argument proceeds. They are each supported by a host of authorities, but they are so thoroughly established and so familiar that we do not deem it necessary to do more in general than to cite some treatise where the rule is stated and where the authorities supporting it may be found if reference to such authorities is desired.

These rules are:

(1) The remedy of a receiver *pendente lite* is the most drastic provisional remedy which a court of equity may give. It is more drastic than the remedy of an injunction *pendente lite* which but stays action by the defendant for the purpose of preserving the *statu quo*, since the appointment of a receiver disturbs and changes the *statu quo* and takes from the defendant prior to a determination of the merits, and merely upon a claim of the plaintiff as yet unestablished, something which the defendant has, to-wit: the possession of the prop-

erty in controversy. The result is that the courts are, or at least should be, extremely loathe to appoint a receiver before judgment, and will not do so except in cases of the clearest sort.

*High on Receivers*, Sections 3 and 15;

*Foster on Federal Practice*, 6th Edition, Section 303;

*34 Cyc.* 21.

(2) The courts are particularly loathe to disturb the possession of a defendant having the legal title to the property, and, by reason of that fact, presumptively rightfully in possession.

*Folk v. United States*, 233 Fed. 177;

*High on Receivers*, Section 19;

*34 Cyc.* 48.

(3) The third rule we may state in the language of the syllabus of *Folk v. United States*, 233 Fed. 177, a syllabus prepared by the court. It is:

“In order to bring a case within the exceptions to this general rule (that the court will not appoint a receiver of property in the possession of a defendant having the legal title) there must be clear proof (1) that there is imminent danger that unless a receiver is appointed the property or its proceeds will be materially deteriorated in value or wasted; (2) that the plaintiff will suffer irreparable loss from such deterioration or waste, and he can rarely suffer such loss when the defendants are solvent and abundantly able to respond to any damage they cause, or where they will give a good bond of indemnity against it; (3) that upon the pleadings and preliminary proofs there is a strong probability that the plaintiff will ultimately recover.”



See also

*High on Receivers*, Section 11;

*34 Cyc.* 35 and 46.

There are also authorities holding, or at least stating, that where it appears that the defendant's possession was obtained by fraud, a receiver may be appointed.

*High on Receivers*, Section 11;

*23 Ruling Case Law*, p. 29 (Section 25).

This rule manifestly proceeds upon the theory that the defendant having obtained possession tortiously, should not be permitted to have the advantage of that possession during the litigation, and that to deprive him of it is not so much to disturb the *statu quo* as to restore that status which has been tortiously disturbed by the defendant. It is, of course, a rule which has no application when the defendant's possession was not itself, as distinguished from the defendant's claim of title, tortiously obtained. It is also a rule which manifestly applies particularly, if not exclusively, to cases where the defendant obtained possession only during the litigation or very shortly before its commencement. It is not a rule which can well apply where the defendant has been in possession for any considerable period of time.

In addition to the foregoing, there are two further rules, secondary in nature, but equally familiar. These are:

(4) Where the equities of the plaintiff's bill are fully and fairly met by the defendant, either by denials or by affirmative averments, a receiver should not be

appointed unless such denials or averments are overcome by a showing by the plaintiff that they are false.

*High on Receivers*, Section 24;

*34 Cyc.* 133.

This rule is, of course, but a corollary of the rule that a receiver will not be appointed unless, in the language of *Folk v. United States*, it appear

“that upon the pleadings and preliminary proofs there is a strong probability that the plaintiff will ultimately recover.”

(5) Where matters are averred by the plaintiff upon information and belief only, and are denied directly and positively by the defendant, the denials of the defendant must be taken to be true.

*34 Cyc.* 134.

We pass now to a discussion in the light of the foregoing rules of the particular propositions involved in the present case. They are these:

1. The ground and the sole ground upon which the appointment of a receiver was asked was conclusively shown not to exist.

2. The defendants were bona fide purchasers of the vessel for value and without notice.

3. The plaintiff is not entitled to recover in any case without repaying or offering to repay the \$290,000 which C. Henry Smith advanced from his own funds for the alleged purchase of the vessel, and such payment the plaintiff has not made or offered to make.

4. The trust which the plaintiff is seeking to enforce is one illegal under the Norwegian law to which the

vessel is subject, and the transfer which the plaintiff seeks to compel is prohibited by that law.

The last three propositions have for their basis, of course, the rule that in order to justify the appointment of a receiver it must appear that "there is a strong probability that the plaintiff will ultimately recover."

This does not appear if any one of these three propositions is correct.

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## I.

### **THE GROUND AND THE SOLE GROUND UPON WHICH THE APPOINTMENT OF A RECEIVER WAS ASKED WAS CONCLUSIVELY SHOWN NOT TO EXIST.**

As we have already stated, the only ground on which a receiver was asked is that just before the commencement of the action the plaintiff was dispossessed of the vessel by the defendants through the action of the captain, who, it is alleged, had been theretofore reporting to the plaintiff and taking orders from it, in refusing longer to do so and reporting to the defendants and taking orders from them. The averment of the petition for the appointment of the receiver is that up to July 15, 1921, or just four days before the commencement of the action, the captain had been so reporting to the plaintiff and taking orders from it.

Preliminary to a discussion of the truth of this averment, it should be observed that there is no allegation whatever of any fraud, violence or other tort whereby the plaintiff was deprived of possession. There is nothing but the bare allegation that on the day specified

the plaintiff was in effect deprived of possession by the refusal of the captain longer to report to and take orders from it. It would seem to be an essential element of any sufficient showing for the appointment of a receiver on the ground that the plaintiff has been deprived of the possession of the property that the plaintiff should have been so deprived tortiously. So far as we are aware, the rule has always been stated to be that the *fraudulent* deprivation of the plaintiff of possession was a ground for the appointment of a receiver. It is possible that the rule might be extended to cases where the plaintiff was deprived of possession by some other tort than fraud, as, for instance, by threat or actual violence, but that there should be a tort in the acquisition of possession by the defendant would seem to be essential because of the reason upon which the rule proceeds. That reason, as we have stated, is that the defendant, having obtained possession tortiously, should not be permitted to have the advantage of that possession during the litigation, and that to deprive him of it *pendente lite* is not so much to disturb the *statu quo* as to restore that status which has been tortiously disturbed by the defendant. It is a reason which has no application whatever where the possession of the defendant has not been tortiously obtained. If this be true, then the petition in this case for the appointment of a receiver fails on its face to state any valid ground for such appointment.

But whether or not it was necessary for the plaintiff to show that it was tortiously deprived of possession, it was conclusively shown that the plaintiff had not been

deprived of possession, had not, in fact, had possession, and that the averment of the plaintiff's petition in that respect is untrue. The fact of the matter is that the vessel came into the port of San Francisco on May 24, 1921, and seven days later, that is, on May 31, 1921, the plaintiff itself brought a libel against the vessel for her possession and restitution (Tr. pp. 45-47), alleging that it was the lawful owner of the vessel and that possession of her was wrongfully withheld by the captain and C. Henry Smith (Tr. p. 46). This libel was still pending and the plaintiff had not obtained possession when the present action was commenced (Tr. p. 43). How the making of the averment of the plaintiff's petition in this case, that it was in possession of the vessel up to July 15th, can be justified in view of the fact that on May 31st it had brought an action for the purpose of recovering possession, we are wholly unable to see. We are unable to take any view of the averment in the petition other than that it was a reckless statement of that which clearly appears not to be the fact.

In addition to the fact that at the very time when the plaintiff alleges that it was in possession of the vessel it was in fact endeavoring to obtain possession by legal proceedings and had been so endeavoring for a considerable time before, there is the uncontroverted affidavit of the captain (Tr. pp. 49-50) to the effect that he became the captain of the vessel on November 3, 1920, immediately after her transfer from the Japanese to the Norwegian flag, and had been her captain and in the immediate exclusive possession of her ever since;



that he was instructed at the time to follow the orders of C. Henry Smith and had done so until the transfer of the vessel to the defendant Eriksen, after which he followed Eriksen's orders; that he had not at any time received any orders from the plaintiff, and that he had never even heard of the plaintiff until the vessel was libeled by it on May 31st. There is also the affidavit of C. Henry Smith (Tr. pp. 50-56), detailing his purchase of the vessel from her former Japanese owners and his furnishing from his own funds of \$290,000 of her purchase price, and averring (Tr. pp. 52-53) that he had caused the vessel's captain to be appointed, that the captain had reported exclusively to him and to her registered owner, Mathiesen, until she was transferred to Eriksen, and that the plaintiff never had possession of her and never gave instructions or orders with regard to her.

The only contention that the plaintiff ever had possession which can be made with any possibility of justification is that C. Henry Smith was acting for the plaintiff and that because he was so acting the plaintiff had, through him, constructive possession of the vessel. But even such constructive possession must have ended prior to the bringing of the libel mentioned, and furthermore it was but a constructive possession, of which the captain and the defendants were ignorant. The loss of such constructive possession, unless lost through fraud, is certainly not the sort of loss of possession which will justify the appointment of a receiver.

The plain fact of the case is that it was Smith, who through the captain had possession and control of the

steamer, that he was recognized as her real owner, both by the captain and her registered owner, Mathiesen (Tr. p. 77), that he sold, or rather hypothecated, the vessel to the defendant Norsk Hydro, and caused her legal ownership to be transferred to Eriksen, and that following such transfer of ownership, and as an incident of it, possession was given the defendants through the captain's recognizing them as owners. The case, in other words, is simply one where the defendants acquired the legal title to the vessel, and acquired possession at the same time as an incident of such ownership. A possession so acquired is certainly not tortiously acquired, and there does not lie either in the fact that the defendants had possession or in their method of acquiring it any reason why such possession should be disturbed *pendente lite* and before it is finally determined that the plaintiff has the superior right to the property. On the contrary, every reason exists why the courts should be extremely loath to disturb a possession so honestly, even if possibly mistakenly, acquired, until it is certain that the defendants are not the true owners.

We submit, therefore, that the ground upon which a receiver was asked for, namely, that the plaintiff had been in possession until just before the commencement of the action and had then been deprived of it by the defendants, was conclusively shown to be untrue, and that for this reason alone the plaintiff's petition should not have been granted.

We take the liberty of repeating again that the sole ground upon which a receiver was asked for is that

just discussed. It is true, as we have said, that it is averred, and for that matter admitted, that the defendants would operate the vessel, and, as an incident of such operation, would send her to sea. If this were done, she would, of course, be exposed to loss through perils of the sea. But that this is not a justification of the appointment in this case, and was not advanced as a ground for the appointment, appears clearly from the fact that a receiver was asked for and appointed for the very purpose of operating the vessel and necessarily exposing her to those same perils. The petition for the appointment of the receiver makes it very plain that it was not the operation and sending to sea of the vessel that was objected to, but it was her operation by the defendants.

As to the fact that sending the vessel to sea involved removing her without the territorial limits of the court's jurisdiction, a complete answer is that it is not averred or claimed that such removal would destroy or affect the jurisdiction of the court or in any manner whatever render inefficacious a final judgment against the defendants if one be made. On the contrary, it affirmatively appears that the defendants have submitted to the jurisdiction of the court and are amply able to respond to any judgment against them, and we have the remarkable spectacle of an insolvent and irresponsible plaintiff asking for and obtaining the appointment of a receiver against a solvent and responsible defendant, who has both possession and the legal title, and who acquired the possession contemporaneously with and as an incident of acquiring the legal title.

Nor is there room for the contention that if the ship were not within reach of the process of the court, a judgment against the defendants might be difficult or impossible of enforcement because of the fact that the defendants are not citizens of this country, but of Norway. A complete answer is that it is nowhere averred and it does not appear that the defendants have not, within reach of the process of the court, property amply sufficient to satisfy any judgment that might be rendered against them.

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## II.

### **THE DEFENDANTS WERE BONA FIDE PURCHASERS OF THE VESSEL FOR VALUE AND WITHOUT NOTICE.**

We think it hardly admits of controversy that upon the pleadings and proof in this case it must be taken that the defendants are bona fide holders of the legal title for value and without notice, unless the fact that they knew when they acquired the vessel that Mathiesen held her registered ownership in trust was constructive notice to them of the plaintiff's claim. The burden rested upon the plaintiff to show that the defendants were not bona fide purchasers for value and without notice. The plaintiff's averments that the defendants were not such purchasers are upon information and belief only and are flatly and positively denied. In addition to this, the transaction whereby the defendants acquired the vessel is detailed, and it appears clearly that a valuable consideration was given and that the transaction was one which the defendants would hardly

have entered upon and consummated if they had had the slightest suspicion that any one but Smith had a beneficial interest in the vessel. Smith was already heavily in their debt, and they were hardly likely to allow him to get further in their debt to the extent of \$90,000 if they had any notion that anyone else might claim a superior right in the vessel. As we have said before, the only answer, as we remember it, that was made by the plaintiff's counsel in the lower court to the contention that upon the pleadings and proof it must be taken that the defendants were bona fide purchasers for value and without notice, is that they had constructive notice for the reason stated. The sole question, then, is as to such constructive notice.

We think it likewise hardly admits of question that where two persons act in conjunction in disposing of property, one in the capacity of the holder of the legal title and the other in the capacity of the beneficial owner, they jointly represent that one holds the legal title for the other and that between them they hold the full legal and beneficial ownership. Their assuming to dispose of the property in those capacities is the strongest possible method of making such a representation. Such are the facts in this case. Smith offered the vessel to the defendants as his own, and offered to have her transferred to them by her registered owner. Her registered owner recognized Smith's right to do this and delivered the bill of sale in accordance with his instructions. The two assumed together to dispose of the vessel, the one as trustee holding the registered ownership, and the other as the beneficiary for whom such



ownership was held. The defendants purchased from them, believing them to be such trustee and beneficiary, respectively, and to have between them the full legal and beneficial ownership. The question then is, are the defendants nevertheless to be charged with constructive notice that Smith was not the true beneficiary for whom the registered title was held, simply because of the fact that the defendants knew there was a trust? When the fundamental principles governing the matter of constructive notice are stated, the answer to the question is plain. In the language of

*Wilson v. Wall*, 6 Wall. 83, 18 L. Ed. 727,

“A chancellor will not be astute to charge a constructive trust upon one who has acted honestly, and paid a full and fair consideration without notice.”

It is therefore not sufficient in order to charge a purchaser for value with constructive notice that it be shown merely that if he had followed up every source of inquiry open to him he either might, or certainly would, have acquired knowledge of the latent equity. It must appear either that he has fraudulently turned away from making an inquiry, or at least that the facts were such that he was culpably and grossly negligent in not making inquiry. In

*Jones v. Smith*, 1 Hare 43, 66 Eng. Rep. R. 943,  
the vice-chancellor states the rule thus:

“If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of the facts which the *res gestae* would suggest to a prudent mind; if

mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser,—there the doctrine of constructive notice will not apply; there the purchaser will, in equity, be considered, as in fact he is, a bona fide purchaser without notice.”

In

*Ware v. Lord Egmont*, 4 De Gex, M. & G. 460,  
43 Eng Rep. R. 586,

the lord chancellor said:

“Where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice he ought not to be treated as if he had notice, unless the circumstances are such as to enable the court to say, not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him; that he would have acquired it, but for his gross negligence in the conduct of the business in question. The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by prudent caution, have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence.”

It is also elementary and familiar that if there are circumstances which would properly put a person upon inquiry, yet such circumstances are only constructive notice of matters which they themselves suggest and are not constructive notice of matters which they do not suggest. A frequently quoted expression of the rule is found in the old case of

*Birdsall v. Russell*, 29 N. Y. 220.

It is there said:

“The rights of the purchaser are not to be affected by constructive notice unless it clearly appear that the inquiry suggested by the facts disclosed at the time of the purchase would, if fairly pursued, result in the discovery of the defect existing but hidden at the time. There must appear to be in the nature of the case such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a clue—a reasonable and natural clue—to the latter.”

See also

*39 Cyc.* 1703.

Now, in the present case, when it appeared to the defendants that Mathiesen held the legal title to the vessel in trust, and it was also represented to them that he held it in trust for Smith, and Mathiesen himself confirmed this representation by recognizing Smith and following his instructions, where was there anything which should properly have alarmed the defendants or caused them to suspect that someone other than Smith was the true beneficiary? When the holder of the legal title recognized Smith as the owner subject to whose orders he held the title, what more was there to it? Was not the holder of the legal title the one who should know for whom he held it if he did not hold it for himself? And if he says to the defendants, as in effect he did, that he holds it for Smith, what is there to suggest that he holds it in truth for somebody else, or what is there to cause the defendants to suspect that he so holds it, or to make them guilty of fraud or culpable negligence in not seeking further in-

formation? If I go to the holder of the legal title to real property or to a ship, and he informs me that he holds the property for Smith, surely I am justified in dealing with him and Smith as together the full owners of the property unless there comes in something else indicating that the information given me is not true. The mere fact that the legal title is held in trust does not so indicate. The inquiry as to whom the property is held in trust for is already answered and answered by the one person who should know, namely, the holder of the legal title. There must be some further circumstance indicating to me that the information given me is false or I cannot be charged with constructive notice that it is false. No such circumstance appears here.

Putting the matter in a slightly different way, the information which the defendants had and upon which they acted was that the vessel was held in trust for Smith. Surely information that the property was held upon one trust, a trust for Smith, was not constructive notice that it was held upon another trust, a trust for the plaintiff. Information as to one trust or latent equity certainly does not suggest another, or give any reason to suspect another.

A case very closely parallel to the present is that of

*The City of Trinidad v. Milwaukee etc. Co.*, 63  
Fed. 883 (C. C. A. 8th Cir.).

There a citizens' committee of the City of Trinidad agreed to furnish a site for the plant of a smelting company if the latter would locate its plant in the city. The smelting company agreed to this and the committee

purchased the site fixed upon and took a deed to it in the name of one of them, Wight, "as trustee". The company erected its smelter on the land and the trustee then conveyed the land to the company. It subsequently appeared that the money used by the citizens' committee to purchase the land was misappropriated from the city's funds and the city brought an action to enforce a lien upon the property for the recovery back of its funds which had been used in making the purchase. The smelting company had taken the deed from the trustee in ignorance of the misappropriation, but it was contended that it was nevertheless charged with constructive notice of the city's rights because it knew that it was taking the land from a trustee and it behooved it to ascertain who was the real beneficiary of the trust. The court, however, held that there was no constructive notice, that the smelting company was justified in acting upon the assumption that the trust was one for the citizens' committee, and that the facts known in regard to the trust furnished no clue or suggestion as to the city's equitable right. Among other things, the court said:

"When it is sought to bind a party by constructive notice 'there must appear to be in the nature of things such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a clue—a reasonable and natural clue—to the latter'. *Birdsall v. Russell*, 29 N. Y. 220, 250. In this case there was not the remotest connection between what the smelting company actually knew or had any reason to suspect and the claim now set up by the city."



See also, as very similar cases :

*Mercantile Bank v. Parsons*, 54 Minn. 56; 55 N.

W. 825; 40 Am. St. Rep. 299;

*O'Neal v. Boone*, 82 Ill. 589.

The argument of plaintiff's counsel in the court below was that the case was the same as, or at least analogous to, one wherein a person purchases from a trustee or agent with limited authority, and that the rule in such a case is that the purchaser must inform himself as to just what the authority of the trustee or agent is. But the present case is not that, nor is it analogous to it. There is no dealing here with a trustee or agent with limited authority. The dealing here was with both the trustee and the supposed beneficial owner recognized by the trustee as such, so that the full ownership, both legal and beneficial, was apparently present and consequently there was also apparently present full authority to deal with the property in any manner.

Following further along this line, it will not be contended that a purchaser may not assume, in the absence of anything indicating the contrary, that the holder of the legal title is likewise the beneficial owner and may not safely deal with him as such. If a purchaser may do this, may he not also assume, when he is in effect informed by the holder of the legal title that the latter holds it for Smith, that the holder of the legal title and Smith represent together the full legal and beneficial ownership of the property, and may he not safely deal with them as such? What difference is there between dealing with a single man who holds the legal title and

represents himself to be the beneficial owner as well, and dealing with two men, one of whom holds the legal title and the other of whom is represented by the holder of the legal title to be the beneficial owner? Is not the full apparent ownership, both legal and beneficial, present in both instances, and is not the equity of a third person chargeable upon the legal title just as much a latent equity in one case as in the other?

We submit, therefore, that the defendants in this case are not to be charged with constructive notice of the right claimed by the plaintiff, and that upon the pleadings and the proof they must be taken to be bona fide purchasers for value of the legal title, accompanied by the full beneficial interest, and without notice. As such purchasers, they have a complete defense to the plaintiff's claim.

We would add one thing more in order to avoid any misapprehension. We have constantly referred to the defendants as purchasers. They, of course, did not purchase the vessel outright. What they did was to take title to her as security for the indebtedness due them, and in one sense, therefore, they were not purchasers, but rather mortgagees, holding the legal title. But as such mortgagees they are entitled to protection to the extent of their debt in the same manner as if they had been outright purchasers. In the sense in which the word "purchaser" is used in the statement of the equitable rule that bona fide purchasers for value and without notice take free of latent equities, the defendants are purchasers, and it is in that sense that we have used the word.

## III.

**THE PLAINTIFF IS NOT ENTITLED TO RECOVER WITHOUT REPAYING OR OFFERING TO REPAY THE \$290,000 WHICH C. HENRY SMITH ADVANCED FROM HIS OWN FUNDS FOR THE ORIGINAL PURCHASE OF THE VESSEL, AND THIS PLAINTIFF HAS NOT DONE.**

The facts in connection with this defense have already been stated and need not be repeated in any detail. They are that upon the original purchase which the plaintiff claims was made by C. Henry Smith for it, and under which alone the plaintiff's right exists, if it has any right, the full purchase price of \$350,000 was advanced by Smith from his own funds, that later, through the plaintiff, there was paid him \$60,000 on account, and that with this exception he has not been reimbursed for the money so advanced, and there has been no offer to reimburse him. These facts are not controverted and they are facts necessarily within plaintiff's knowledge and easily capable of being disproven if untrue. They must be taken to be the facts in the case. The questions presented by their existence are, of course, purely questions of law.

That the defendants at least stand in the shoes of Smith and that the plaintiff cannot recover against them if it could recover against Smith is not open to argument. We may discuss this branch of the case, then, as if the action were one against Smith. So discussing it, and assuming the truth of plaintiff's claim that Smith purchased the vessel for it, the question may be stated thus:

Smith purchased the vessel for the account of the plaintiff, but did so with funds advanced by himself and for which he has not been reimbursed, in the amount of \$290,000. Could the plaintiff in this situation recover the vessel from Smith without paying or offering to pay him the \$290,000?

Neither the situation nor the question presented is a novel one. The case is simply one where A purchases certain property for B, advancing all or a portion of the purchase price himself. In such a case the courts without exception, so far as we are aware, hold that since A made the purchase for B, A takes the property upon a resulting trust for B, but B may not take the property and avail himself of the benefit of the purchase and of the money which A advanced in making it, without repaying A. The requirement that B reimburse A if he wishes to avail himself of the property purchased with A's funds proceeds upon the plainest principles of equity and justice, and the requirement that B do so is but a very simple illustration of the equitable maxim that he who seeks equity must do equity.

The rule is thus stated in

*Campbell v. Freeman*, 99 Cal. 546:

“The rule is familiar that when, upon a purchase of real property, the purchase money is paid by one person and the conveyance is made to another, a resulting trust immediately arises against the person to whom the land is conveyed, in favor of the one by whom the purchase money is paid. The real purchaser of the property is considered as the owner, with the right to control the title in the hands of the grantee and to demand a conveyance from him at any time. The same rule prevails if

the money paid by the party taking the title is advanced by him as a loan to the other, and the conveyance is made to the lender for the purpose of securing the loan. But in the latter case the purchaser cannot demand the conveyance until he has paid the money advanced, and for which the land is held as security. In such a case the grantee holds a double relation to the real purchaser, he is his trustee of the legal title to the land and his mortgagee for the money advanced for its purchase, and, as in the case of any other mortgage which is evidenced by an absolute deed, is entitled to retain the title until the payment of the claim for which it is held as security; and he may also enforce his lien by an action of foreclosure. The conveyance is none the less a mortgage because it was conveyed to him directly by a third party, to secure his loan to the purchaser for the amount of the purchase money, than if the conveyance had been made directly to the purchaser in the first instance, and the purchaser had then made a conveyance to him as a security for the money that he had previously borrowed, with which to make the purchase. He is regarded as holding the land in trust for the protection of the purchaser, but this rule is not to be so extended as to enable the purchaser to work him an injury."

The following cases lay down the same rule:

*Hidden v. Jordan*, 21 Cal. 92;

*Milliard v. Hathaway*, 27 Cal. 119;

*Walton v. Karnes*, 67 Cal. 255;

*Ward v. Matthews*, 73 Cal. 13.

See also

15 *Amer. & Eng. Ency. of Law* 1147, and cases there cited.

So plain is the justice of the rule, and so strongly is it insisted upon, that not only is it applied where



the trust is a resulting one arising from a purchase by A for B pursuant to an understanding between them, but it is applied where the trust is a constructive one based upon fraud or other wrong upon A's part. In other words, even if A has been guilty of fraud or wrong by reason of which a trust is imposed upon him, yet he will still be protected to the extent to which his money is in the trust property.

*Rothwell v. Dewees*, 2 Black (U. S.) 613 (17 L. Ed. 309);

*Haswell v. Standing*, 152 Iowa 291; 132 N. W. 417;

*Patterson v. DeLong*, 11 Colo. A. 103; 52 Pac. 687.

In *Rothwell v. Dewees*, just cited, for example, an agent, whose duty it was to pay the taxes on his principal's property, permitted the property to be sold for taxes and himself bought it in at the tax sale. The court held that he held the property in trust for his principal, but that the latter could not recover it except upon reimbursing the agent for what he had paid on account of the property.

The rule is so familiar and so well established, and the simple justice of it is so plain, that we do not care to take the attention of the court by further discussion of it.

The only reply in the lower court, as we remember, to the proposition that the plaintiff could not recover even against Smith, and if not against him, certainly not against the defendants, without the repayment of the \$290,000 for which Smith had not been reimbursed, and

that because the plaintiff had not paid or offered to pay this sum it had no cause of action and was not entitled to the appointment of a receiver, was made by the court itself. It was that the rights of Smith and of the defendants, his assignees, could be protected by the final decree which could be so moulded as to require payment by the plaintiff as a condition of recovering the vessel.

A very brief consideration of this reply will disclose its fallacy. It means, in this case for example, that although there may be in reality nothing to be accomplished by the litigation since the plaintiff may be wholly unwilling to pay \$290,000 as a condition to the recovery of the vessel and will not comply with the final decree, if it so provides, but will allow the defendants to keep the vessel, it may yet go on and litigate to a fruitless decree, and, in the meantime, have the defendants deprived of their possession by the appointment of a receiver. If the plaintiff must pay \$290,000 as a condition of recovering the vessel, certainly as a condition of maintaining its action it should make a tender of compliance with that condition. Why should the time and attention of the courts be engaged and the opposing parties harassed unless the plaintiff offers compliance with the condition which it must comply with before it can have the relief it seeks? The vessel in this case cost, in the fall of 1920, \$350,000. It is a matter of common knowledge that the value of shipping fluctuates sharply and has fallen since the fall of 1920 50% or more. To permit the plaintiff now to wait until the final decree without offering to pay the \$290,000

is simply to permit it by this litigation to speculate upon the value of the vessel—to take the vessel if at the time of the final decree it is worth \$290,000 or more, and not to take it if it is not.

The reason advanced by the lower court, furthermore, wholly fails to take into consideration the position of the defendants. It may well be that if the plaintiff had offered the \$290,000, the offer would have been accepted and there would have been no litigation. It is certainly not right that the defendants, entitled to hold the vessel until the \$290,000 is paid, should be harassed with litigation unless that amount has been tendered them. Can it be said that they are in default or that there is any cause of action against them until such amount is tendered them and refused? How, then, can the plaintiff maintain this action against them without such tender? Our position upon this point is supported by the authorities. In an exactly similar case to the present, the court said in

*Hoffman v. Buchanan*, 123 S. W. 168 (57 Tex. Civ. A. 368):

“Assuming that, under the testimony, the court should have concluded that the agreement between the parties created a direct and express trust by which Buchanan acquired and held the title for Hoffman, the testimony showed that Buchanan paid for the land with his own means. *From this it follows that Hoffman was not entitled to the conveyance sought, except upon a repayment of the purchase price thus advanced.* The court found, upon conflicting evidence, that Hoffman never paid or tendered payment of that sum. This conclusion must be regarded as a finding that no offer tantamount to a tender had ever been made by Hoffman.

While appellant controverts the correctness of this finding, it is conceded that no payment has in fact ever been made by Hoffman. Admitting the existence of the trust relation insisted upon by counsel, still the appellant is not entitled to recover upon his own showing. In his pleading he nowhere offers to make payment, or avers a willingness or ability to do so. *Had he pleaded the facts proved as to the title upon which he relied for recovery, he would not have stated a cause of action without also offering to do equity by alleging a willingness and ability to pay the purchase price as a condition of a judgment in his favor.*" (Italics ours.)

The exact situation presented here was presented in *Uehling v. Lyon*, 134 Fed. 703.

There the plaintiff's bill was dismissed because he had not offered to pay the amount to which the alleged trustee was entitled before the latter should be deprived of the trust property.

The case is accurately stated in the syllabus, thus:

"Where defendant held stock in trust for M, which was subject to defendant's equitable claim for services, rendered in executing the trust, and complainant's only claim to certain of such stock was through M, complainant could not maintain a bill to compel defendant to transfer the stock to him without offering to satisfy defendant's claim thereon."

The reasons why a plaintiff should not be permitted to maintain an action to have property transferred to him as property held by the defendant as trustee for him unless he tenders payment of all advances due to the trustee, have double force where such a plaintiff asks for the appointment of a receiver *pendente lite*. The plaintiff is not entitled to possession of the property until

he pays the defendant the amount the latter has advanced upon it, and the defendant is entitled to such possession until the plaintiff does so pay or offer to pay. Surely in such a situation the plaintiff may not deprive the defendant of possession by securing the appointment of a receiver *pendente lite* when he has not paid or offered to pay the amount of the defendants' equitable lien.

We submit, therefore, that it must be taken upon the pleadings and proof that the plaintiff in this case cannot recover the vessel from the defendants except upon the payment of \$290,000, and that because the plaintiff has made no tender of this payment and has not even averred its willingness to pay, it cannot recover in the present action and, above all, it cannot deprive the defendants of their possession by the appointment of a receiver *pendente lite*. If the plaintiff desires provisional relief of a nature so drastic as the appointment of a receiver, certainly it ought at least to offer compliance with the condition which it must comply with before it can have the final relief it seeks.

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#### IV.

**THE TRUST WHICH THE PLAINTIFF IS SEEKING TO ENFORCE IS ONE ILLEGAL UNDER THE NORWEGIAN LAW TO WHICH THE VESSEL IS SUBJECT, AND THE TRANSFER WHICH THE PLAINTIFF SEEKS TO COMPEL IS PROHIBITED BY THAT LAW.**

The Norwegian statute of July 21, 1916, as amended July 13, 1917, reads:



“Section 1. A ship, or a share in a ship, entered in the Register of Norwegian Ships, or for which a provisional Certificate of Nationality has been issued, must not be transferred, in any form whatever, to any person who cannot be the owner of a Norwegian ship under Section 1 of the Maritime Law of July 20, 1893. Nor shall it be permissible to transfer any share in a company owning such a ship to any person who cannot be the owner of a Norwegian ship, provided that by such transfer the ship would cease to be a Norwegian ship.

“Section 2. In special cases the Government Department concerned may grant dispensation from the prohibition provided by Sec. 1.

“Section 3. The transfer of a ship, or share in a ship, in contravention with Section 1, must not be registered, and the ship must not be struck off the Register unless the dispensation referred to in Section 2 has been granted. Nor may a ship belonging to a company be struck off the Register owing to the transfer of a share in the company contrary to the prohibition laid down in Section 1.

“Section 4. Any transgression of the prohibition referred to in Section 1 shall be liable to a fine or imprisonment for a period not exceeding 6 months, while the ship or share sought to be sold in contravention with the prohibition will be subject to forfeiture to the State Treasury. If this be not practicable, the value of the ship or share shall be claimed from the offender.

“Section 5. The present law shall come into force without delay.”

The meaning of this statute is plain. It prohibits the transfer of a vessel “in any form whatever” to any person who cannot be the owner of a Norwegian ship under Section 1 of the Maritime Law of July 20, 1893. Section 1 of the Maritime Law of July 20, 1893, as likewise amended July 13, 1917, reads:

“A ship is a Norwegian ship when owned exclusively by Norwegian State-Citizens.

“A ship belonging to a Joint Stock Company is a Norwegian ship, when the Head Office of the Company and the seat of its Directors are in this Kingdom and the Directors are Norwegian state-citizens domiciled in this country and shareholders in the ship, and when the value of shares held by Norwegian state-citizens amounts to at least six-tenths of the share capital. Without the consent of the directors no persons other than a Norwegian state-citizen can become shareholders in a company to which a Norwegian ship belongs. The Directors of such a company shall every year in the month of January forward to the Ministry concerned a list showing the name, profession, address and nationality of every shareholder in the company at the end of the preceding year, and the number of shares held by them respectively.

“The provisions contained in the second clause shall apply in like manner to ships belonging to Commandite Companies of Shareholders so that the rules prescribed respecting the Directors and the share capital shall, in respect of Commandite Companies of shareholders, apply to the commandite-shareholders and to the commandite capital.

“In the operation of this paragraph the State Institutions and Funds administered by the State, Norwegian Municipalities and Parishes, Norwegian Savings Banks as well as Corporations and Foundations of public utility having a Norwegian Management whose seat is in Norway shall be deemed equal to Norwegian subjects.”

The meaning of this statute also is plain. It is: (1) that a Norwegian vessel must be owned by a Norwegian subject, and (2) that when the Norwegian subject is a Norwegian corporation, at least six-tenths of its stock must be owned by Norwegian citizens.

Such being the Norwegian law, two things are evident: First, assuming that the original purchase of the vessel from the Japanese was for the account of the plaintiff, the arrangement upon which she was purchased, namely, that she was to be given a Norwegian registry in the name of a Norwegian subject, but with the plaintiff, an American corporation, as the real owner (Tr. pp. 58, 59), was an arrangement in evasion of the Norwegian law and made for the purpose of obtaining for the benefit of the plaintiff the privileges and advantages of a Norwegian registry when the plaintiff was not entitled to them. Second, a transfer now of the vessel by the defendants to the plaintiff is positively prohibited by the Norwegian statute, and if made by the defendants would subject them to fine and imprisonment and the vessel to forfeiture under the Norwegian law.

Our own statutes at present are practically the same with reference to American vessels as the Norwegian statutes with reference to Norwegian vessels. They provide that no vessel is entitled to the privileges and advantages of an American registry unless American owned, and that an American vessel may not be sold or transferred from under our flag without governmental permission. If the character of the vessel and the nationality of the parties in this case were reversed, and there was presented to this court the claim of a Norwegian corporation seeking to enforce against American citizens a claim to an American vessel, it hardly admits of question that the plaintiff could not obtain relief in the face of our statutes.

In the first place, the very trust upon which the plaintiff relies in such a case would be illegal because entered into by the original parties to it, of whom the plaintiff was one, for the purpose of evading our statutes and giving to the plaintiff, a Norwegian subject, the advantage of owning and operating a vessel under an American registry. Just such trusts have come before our courts and before the English courts under similar English statutes and have been held illegal and therefore unenforceable.

*Lewin on Trusts*, Section 166,

makes the following statement as to the English law:

“The court cannot imply a resulting trust in evasion of an act of parliament, and therefore [under the old Registry Acts] if A on purchasing a ship, took the transfer in the name of B, the complete ownership, both legal and equitable, was in B. In order to enforce the navigation laws and to secure to British subjects the exclusive enjoyment of British privileges, the Registry Acts required an exact history to be kept of every ship, how far throughout her existence she had been British built and British owned, and if implied trusts were permitted the whole intent of the legislature might have been indirectly defeated.”

See also

*Ex parte Yallop*, 15 Vesey 60; 33 Eng. Rep. R. 677;

*Ex parte Houghton*, 17 Vesey 251; 34 Eng. Rep. R. 97.

In

*Ogden v. Murray*, 39 N. Y. 202,

at page 206, it is said:

“The question thereupon arises, may a foreign corporation, in order to obtain and keep all the advantages derivable from a trade which can only be advantageously carried on in American vessels, registered as such, under a system which makes a fraudulent registry a forfeiture of the ship, and which requires the oath, that no foreigner has any interest in the ship,—purchase and employ ships for the sole use and benefit of the corporation, and with expressed authority to direct and control their use and disposition, and cover the ownership under a trust in American citizens, they taking the title for that purpose.

“I cannot resist the conclusion that this is not only an evasion, but a fraud upon the laws of the United States, which ought not to be sustained or sanctioned, directly or indirectly, and that no court should hold that a trust for such a purpose should be upheld either to give compensation to the trustees or for any other object.”

A wholly analogous case was presented under the English statute forbidding the ownership of land by Catholics. It was held that because of this statute, if A, a Catholic, purchased land in the name of B, the courts would not enforce against B a trust in favor of A.

*Redington v. Redington*, 3 Ridge 184;

*Lewin on Trusts*, section 167.

Another analogous case is presented under our own homestead acts, which provide, in effect, that the public land may not be homesteaded for the benefit of another than the homesteader. A trust may therefore not be enforced against the homesteader.

*Caroll v. Draughon*, 56 So. 207; 173 Ala. 327;

*Clark v. Bayley*, 5 Oreg. 343;

*Shorman v. Eakin*, 1 S. W. 559; 47 Ark. 351.



In the second place, the very relief sought in such a case—that of the transfer of an American boat to a foreign citizen—is prohibited by our statute and is against the declared policy of our law. In other words, if the court should direct the defendants to do that which the plaintiff seeks to have them directed to do, the court directs a violation of the law. That the court will not do this when it is our law that is involved is not open to argument.

There can, then, be no reasonable question as to the proper action of our courts if the present case arose under our own laws. Will they take the same action when the case arises, as it actually does, under the laws of a foreign state? This is the final question in connection with the defense under discussion.

The courts of this country are, of course, not controlled by the laws of a foreign state, and they may disregard those laws, if they please, and recognize and enforce contracts, trusts and other arrangements for evading or violating them, and may even by decree compel their violation. But the plainest reasons of comity require that neither our courts nor the courts of any other nation that claims to be civilized and to desire to live on terms of amity with sister nations should do this. What, for instance, would our opinion be of the action of the courts of Norway if they endeavored to compel an American citizen to transfer an American vessel to a Norwegian citizen when our laws provide that no transfer of an American vessel to a foreigner may be made? Would we not consider it a gross failure to recognize the rule of comity which should prevail

among friendly civilized nations and be followed by their courts? Yet if we would so look at such a decree by a Norwegian court, if taken against one or more of our citizens with reference to an American vessel, must not our courts in turn take the same view when they are asked to compel citizens of Norway to make a transfer of a Norwegian vessel to an American when the laws of Norway expressly forbid such a transfer?

This rule of comity is thoroughly well recognized by the courts and so far is it carried that the courts hold illegal not only a contract involving directly a violation of the law of a foreign state, but a contract which is made merely for that ultimate purpose without itself involving any violation of the law of the jurisdiction where it is both made and is to be performed. Thus a contract made in Massachusetts for the sale of liquor there, with the object, however, on the part of the buyer, known to the seller, of importing the liquor into Maine in violation of the laws of the latter state, was held illegal by the courts of Massachusetts, although under the law of Massachusetts, where the contract was not only made but was to be performed, there was no objection to it.

Judge Holmes, speaking for the court, lays down the rule of comity thus (*Graves v. Johnson*, 156 Mass. 211; 30 N. E. 818; 15 L. R. A. 834):

“Of course it would be possible for an independent state to enforce all contracts made and to be performed within it without regard to how much they might contravene the policy of its neighbors’ laws. But in fact no state pursues such a course of barbarous isolation. As a general proposition,

it is admitted that an agreement to break the laws of a foreign country would be invalid. Pollock, Cont., 5th Ed. 308. The courts are agreed on the invalidity of a sale when the contract contemplates a design on the part of the purchaser to resell contrary to the laws of a neighboring state, and requires an action on the part of the seller in furtherance of the scheme. Waymel v. Reed, 5 T. R. 599; Gaylord v. Soragen, 32 Vt. 110, 76 Am. Dec. 154; Fisher v. Lord, 63 N. H. 514, 3 Atl. 297; Hull v. Ruggles, 56 N. Y. 424, 429."

We respectfully submit, therefore, that the original trust under which the plaintiff here claims was illegal as involving and contemplating a violation of the laws of Norway, and that in any case the courts of this country will not compel the transfer by Norwegian citizens of a Norwegian ship to one not a citizen of Norway, in the face of the Norwegian statute prohibiting any such transfer. Yet the ultimate relief sought by the plaintiff is just such a transfer and nothing else.

Dated, San Francisco,

October 8, 1921.

Respectfully submitted,

MCCUTCHEM, OLNEY, WILLARD, MANNON & GREENE,  
McCLANAHAN & DERBY,

*Attorneys for Appellants.*

WARREN OLNEY, JR.,

*Of Counsel.*

No. 3758

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

9

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIE-  
SELSKAB (a corporation) and BJARNE ERIK-  
SEN (an individual),

*Appellants,*

VS.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY  
(a corporation),

*Appellee.*

BRIEF FOR APPELLEE.

LOUIS FERRARI,

BELL, SIMMONS & CREECH,

*Attorneys for Appellee.*

GOLDEN W. BELL,

*Of Counsel.*

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DIVISION OF RECORDS





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No. 3758

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIE-  
SELSKAB (a corporation) and BJARNE ERIK-  
SEN (an individual),

*Appellants,*

vs.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY  
(a corporation),

*Appellee.*

## BRIEF FOR APPELLEE.

---

### Statement of the Case.

In this appeal from the interlocutory order of the District Court appointing a receiver *pendente lite*, this Honorable Court is trying the question of whether or not the District Judge improvidently exercised his legal discretion in making such interlocutory order. It is, therefore, essential to plaintiff, and only fair to the Judge below, that this Court have fully before it the facts upon which he exercised that discretion. Accordingly, the facts will be stated at some length, in such order as ap-

pears best calculated to make clear the transactions giving rise to this litigation.

---

#### A. THE HISTORY OF THE TRANSACTIONS INVOLVED.

Plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of California (Tr. 10, 28). That corporation has been in existence since not later than *January 20th, 1919*, at which time O. H. Root was elected one of its directors, and its vice president (Tr. 57, 58). C. Henry Smith was the general manager of that corporation from the time of its organization (Tr. 50), which, as has just been pointed out, took place not later than *January 20, 1919*, to about *April 21st, 1921* (Tr. 50). Said C. Henry Smith was president of that corporation on *October 9th, 1920* (Tr. 58, 59). Said C. Henry Smith was one of the board of directors of that corporation before he tendered to such board his resignation as a director, on *April 19, 1921*. He was an American citizen (Tr. 64).

On *October 9, 1920* (said C. Henry Smith being then president, general manager and a director of plaintiff corporation, as pointed out above), a meeting of the stockholders of plaintiff corporation was held in San Francisco, at which said C. Henry Smith was present, and the following proceedings, which are quoted from the minutes of that meeting, were had:

*"It was decided to purchase the Taigi Maru at the price of £18-0-0, Eighteen Pounds Ster-*

*ling, per deadweight ton; all cash after steamer has been thoroughly inspected and passes the Bureau Veritas requirements, where the steamer is classed. It was built 1919; is 5453 tons deadweight. She is now in a Bristol Channel Port, having been dry-docked and painted and ready for sea.*

“It was also decided to place the steamer under Norwegian flag, and *the ownership of the steamer will be in the name of the California & Oriental Steamship Company*, with a corresponding owner in Norway, according to law there.

California & Oriental Steamship Company,  
C. Henry Smith,  
President,  
O. H. Root,  
Vice-President,  
G. R. Stack,  
Secretary.”

(Tr. 58, 59.)

At no other subsequent meeting of the stockholders or directors of the corporation was said action rescinded or modified (Tr. 59).

The steamer “Taigi Maru” was, at the time of said meeting, a vessel registered under the laws of the Empire of Japan, and was owned by citizens of that Empire (Tr. 32, 33).

On *October 23rd, 1920*, said C. Henry Smith wrote to Chr. Barth, *attorney at law*, Christiania, Norway, the following letter (italics ours):

“Referring to my letter of September 25th, I have had, in the meantime, occasion to transfer a steamer to Norwegian flag *which was purchased for friends here* from Japanese own-



ers, names the 'Taigi Maru' or now named 'Pacífico.'

*"Inasmuch as all negotiations were carried on by cable I had to appoint a Corresponding owner in Norway in order to avoid any delay to the boat, and ship-owner, Mr. Arthur H. Mathiesen, Kristiania, has agreed to act as Correspondent for the steamer and I have so advised the Broker, Messrs. Pinkney & Co., Cardiff, and they are therefore, sending the necessary papers to Mr. Mathiesen.*

*"If you will be willing to attend to the matter of incorporating the steamer in a Norwegian Company for the owners here, please send me a cable. I do not know whether your specialty is Admiralty Law, but if you, for any reason, could not handle this matter, probably you could recommend someone to us, by cable. In the meantime, I beg to mention the necessary particulars to follow in this case:*

*"The owners here of the S. S. 'Pacífico' bought the steamer on a cash basis of £18-0-0 per deadweight ton, or £98,154-0-0, and the capital stock of the company" (i. e. the proposed Norwegian Company) "should be one-half of this amount or £49,077-0-0, or the equivalent amount in Norwegian currency.*

*"I presume it will be necessary, according to Norwegian Law, to have at least three Norwegian Directors besides myself as I am an American Citizen, and if you in that case should be willing to stand as one of the Directors, I would name my brother, Privisor Arthur Smith, Sarpsborg, besides Mr. Arthur H. Mathiesen and I will write him in the matter in the same mail.*

*"The name of the company should be A/S Pacífico. As to your remuneration, we shall, no doubt, be able to agree on this.*

“On account of having been obliged to make the necessary arrangements by cable with *Mr. Mathiesen who will act as Corresponding Owner for the steamer*, we have had no opportunity for drawing up any contract. *As the steamer is owned by a company here*, it would be necessary for me to have some sort of an agreement with Mr. Mathiesen, and I have offered him a remuneration of Kr. 12,000 per year during the time he is standing as Corresponding Owner and the duties will be principally to engage officers whenever any vacancies occur, to make up returns for taxes from statements that we will furnish him from here covering the earnings and expenses; also to attend to the insurance at rates which are no higher than can be obtained from here. *The stock*” (i. e. in the proposed Norwegian company) “*is to be issued in the name of the California & Oriental Steamship Company, San Francisco, California, as this Company is the actual owner of the boat and the shares to be in denominations of Kr. 6,000 or Kr. 12,000.*”

“If there are any other points that have not been fully explained, we can easily do so by cable. In the meantime, remain with kind regards” (Tr. 63, 64, 65).

On *October 25th, 1920*, said C. Henry Smith wrote to the Mr. Arthur H. Mathiesen, referred to in the above letter to Chr. Barth, the following letter (italics ours):

“Referring to your cable today, as per copy enclosed, *in which you suggested a limited company be formed according to Norwegian laws*, I telegraphed in reply thereto that *I had already sent full particulars by mail.*

“You will appreciate that on account of the limited time I had to take over this boat, I had

not made any such arrangement and I am very much obliged to you for accepting the proposition I made, *to act as Correspondent for the boat, and I have now written my friend, Advokat Barth, at Kristiania, with regard to this company. I asked Mr. Barth to get in touch with your good self* and as I also thought it would be necessary to have a third Director under Norwegian law, I suggested my brother, Arthur Smith, Sarpborg, *who also will call on you in this connection.*

"I am thankful for the information in your cable that 6/10 of the capital must be owned by Norwegian subjects and *I am writing Advokate Barth with regard to this stipulation.*

"INSURANCE: I beg to confirm cable in which I asked you to cover Kr. 2,000,000 Hull 6% and Interest and Disbursements Kr. 700,000 2 $\frac{1}{4}$ %. The valuation of the steamer is Kr. 2,600,000, which kindly keep private.

"I have cabled London for rates, but so far have not had any reply as they are very particular about which trade the steamer was to operate, so under the circumstances not having anything definite from London, I accepted your rates on the basis as just mentioned.

"I also appreciate very much that you have engaged three engineers 750, 575 and 480 respectively and three mates 560, 460 and 350 monthly, which is satisfactory and may say that *I had already engaged a Captain through Messrs. Pinkney & Co. on the basis of Kr. 12,000 per year.*

"LOAN WITH MORTGAGE IN STEAMER: I have been in communication with a bank in Norway and also an attorney with regard to a loan and thought possibly you could arrange such a loan with the Skibs-Hypothek Bank for one-half of the valuation, basis Kr. 2,600,000 and I shall be glad to hear on what terms such a loan can

be obtained and particularly at what rate of interest.

*“Messrs. Pinkney & Co. will be sending you the papers after he has made transfer and may say that the transfer will be delayed a couple of days on account of the London bills for the balance of the payment being mailed by our Bank from New York instead of being telegraphed, but presume that these bills will arrive there not later than Thursday of this week”* (Tr. 66, 67).

On or about *October 27th, 1920*, the “*Taigi Maru*” was purchased from her Japanese owners (Defendants’ answer, Tr. 33).

“That upon said purchase being made, said Smith caused said vessel to cease to be registered under the laws of the Empire of Japan and to be registered under the laws of the Kingdom of Norway under the name ‘*Pacifico*’, and with one, A. Mathiesen, a citizen of said Kingdom, as the registered owner thereof.” (Defendants’ answer Tr. 33.)

On *November 3rd, 1920*, immediately upon the “*Pacifico*” being registered under the Norwegian flag with one A. Mathiesen as registered owner thereof, H. J. Hammer became the master of said vessel, and has been her master since that time (Tr. 49).

“That he was put in possession of said vessel as her master by the firm of Pinkney & Company. That at the time he became master of said vessel he was instructed by said firm to obey and follow all orders and instructions delivered to him by one C. Henry Smith” (Tr. 49).



(Note: See above letter of October 25th, 1920, from Smith to Mathiesen.)

On *April 18th, 1921*, C. Henry Smith, at a meeting of the directors of plaintiff corporation tendered his resignation as a member of that board, and his resignation was forthwith accepted (Tr. 59, 60).

On *April 19, 1921*, at a meeting of the directors of plaintiff corporation, C. Henry Smith, who was then present, with the unanimous consent of all of the directors "was directed to send the following telegram to Arthur Mathiesen, corresponding owner, in Kristiania, Norway, to wit:"

"Inasmuch as steamer 'Pacifico' is owned by California and Oriental Steamship Company please cable declaration that such is the fact that you are the representative of this Company.

(Signed) Smith."  
(Tr. 60.)

On *April 20, 1921*, C. Henry Smith complied with said direction and sent said telegram in code (Tr. 60, 61).

It is a fact of the utmost significance, in view of the allegations contained in the answer (Tr. 33) and the affidavit of C. Henry Smith (Tr. 50), to the effect that Mathiesen held the registered ownership of said vessel for "said Smith as the sole beneficial owner, and for no one else," that *he himself sent this telegram.*



On *April 21st, 1921*, C. Henry Smith exhibited to Mr. O. H. Root, vice president and a director of plaintiff corporation, the reply of Arthur Mathiesen (Tr. 61) which was as follows:

“Referring to your telegram just received Pacifico is actually owned by the California and Oriental Steamship Company. I am registered owner of the steamer and representative of this company (stop) Accordance with your instructions bill of sale has been deposited with the Norsk Hydro Kristiania as security for your debts to them. They are entitled to have clean bill of sale at any time transferred to them” (Tr. 62).

Again, it is a fact of the utmost significance that Mathiesen, so far from protesting that he never heard of plaintiff corporation, or that it was not the owner of the “Pacifico”, or that he is not the representative of plaintiff corporation, sent the above telegram.

It then developed that for a considerable period prior to *January 17th, 1921*, defendant Norsk Hydro had engaged in a course of business with said C. Henry Smith, as an individual, whereby it delivered nitrates to C. Henry Smith to be sold by him for it upon a *del credere* commission (defendants’ answer Tr. 34).

[*Note:* The Defendants’ Answer alleges that Norsk Hydro “had engaged in a course of business with said Smith whereby it *sold* him nitrates manufactured by it to be resold by him, *or* whereby it *delivered* nitrates to be sold *by him for it* upon a

*del credere* commission'' (Tr. 34). The allegation is ambiguous as to which, in fact, was the course of business, and it is proper and reasonable, at least for the purposes of this appeal from the interlocutory order of the District Court appointing a Receiver *pendente lite*, to construe it as has been done above.]

In the course of such business between C. Henry Smith, as an individual, and defendant Norsk Hydro, according to the allegations of the answer, Smith was, on *January 17th, 1921*, and for some time prior thereto, had been, personally indebted to said defendant in a considerable sum (answer, Tr. 35). While Smith was so indebted to it, and prior to *January 17th, 1921*, said defendant refused to deliver further nitrates to Smith without payment therefor upon delivery, unless Smith should pay or adequately secure the account between them (answer Tr. 35).

Thereupon, according to the allegations of the answer, and prior to said *January 17th, 1921*, Smith offered to cause the steamer "Pacifico" to be transferred to said defendant as security for said account, provided the defendant would thereafter continue to deliver nitrates to him without requiring, as a condition precedent, the payment of the purchase price therefor, but would allow such price to be charged against him upon such account (answer Tr. 35). Immediately prior to such *January 17th, 1921*, a consignment of nitrates shipped

by said defendant to Smith was expected to arrive in California. Said defendant refused to deliver to Smith the shipping documents for said consignment, and it arrived and was stored and held for the account of said defendant. Thereafter, but still prior to *January 17th, 1921*, said defendant agreed to the above offer of Smith (answer Tr. 35), and:

“thereupon, and performance thereof, and on the *17th day of January, 1921*, the said Smith caused said Mathiesen to transfer said vessel to the defendant” (Norsk Hydro) “by the endorsement and delivery to the latter of the bill of sale therefor, and thereupon said defendant, in consideration therefor, caused said consignment of nitrates hereinbefore last mentioned to be delivered to said Smith without payment of the purchase price therefor, charging said purchase price against said Smith upon said open account” (answer, Tr. 36).

The balance due from Smith to said defendant was thus considerably increased, according to the allegations of the answer, and it is alleged that no part of such balance has been paid and the same is due and payable by Smith to said defendant (answer, Tr. 36).

It was on *January 21st, 1921*, and not on *January 17th*, that Mathiesen deposited the bill of sale of the “Pacífico” endorsed in blank, with defendant Norsk Hydro, as appears from a copy of a letter from Mathiesen to the Bank of Italy, dated *June 24, 1921*, which copy had been delivered by Mathiesen to defendant, Norsk Hydro, and was by it introduced in evidence at the hearing herein (Tr.

76-78). In that letter, Mathiesen says, referring to his above quoted telegram to Smith dated *April 21st, 1921* (Tr. 61, 62):

“I found it, however, at the same time expedient to make a mention of the fact that, according to his” (i. e. Smith’s) “instructions, the Bill of Sale which in due course had been received by me, had on the *21st January, 1921*, been deposited in original with The Norsk Hydro Elektrisk Kvaelstof Aktieselskab, endorsed in blank” (Tr. 77; also see Tr. 78).

At some indefinitely disclosed time after *January 21st, 1921*,<sup>1</sup> defendant Norsk Hydro “caused the name of the defendant Eriksen to be inserted as the buyer in said bill of sale, and by virtue of said bill of sale caused the registered ownership of said vessel to be transferred from the said Mathiesen to the said Eriksen (answer Tr. 37).

Defendant Eriksen was the advocate of defendant Norsk Hydro (Tr. 78).

It is most unfortunate that defendants did not see fit to place in evidence the bill of sale bearing the blank endorsement, or a copy of it, or the document by virtue of which the “Pacifico” was registered as belonging to defendant Eriksen, or to definitely disclose the time at which Norsk Hydro caused the name of Eriksen to be inserted as buyer in said bill of sale, or the time at which defendant Eriksen caused said vessel to be registered in his name, or the time when “defendant Eriksen took and received possession of said vessel from said Smith” as alleged in answer (Tr. 37; also Tr. 50).

Defendant Eriksen came to San Francisco as an officer of the Norsk Hydro and in his individual capacity, for the purpose of representing defendants in and about their claims to said steamship (Tr. 17), arriving on or about *July 7th, 1921* (Tr. 69), was served with process in this suit on *July 18th, 1921* (Tr. 70), verified the answer herein on *August 6th, 1921* (Tr. 42), and thereafter made an affidavit in resistance to plaintiff's application for a receiver (Tr. 56, 57). Yet he discloses none of the above mentioned things.

However, the bill of sale bearing the blank endorsement was the original bill of sale to Mathiesen endorsed in blank by him (see *supra* and Tr. 36, 37, 62, 77). And Mathiesen in his wire of *April 21st, 1921* to Smith says that:

“They” (i. e. Norsk Hydro) “are entitled to have a clean bill of sale at any time transferred to them” (Tr. 62).

And Mathiesen in the copy of his letter dated *June 24th, 1921*, placed in evidence by defendants, says:

“On the *13th inst.*” (i. e. *June 13th, 1921*) “I received from Norsk Hydro information to the effect that the vessel had under the Bill of Sale deposited with them on the *21st January* been registered as belonging to their advocate, Mr. Bjarne Eriksen, here. I have therefore no longer anything to do with this ship” (Tr. 77, 78).

It is therefore a proper and reasonable inference, at least for the purposes of this appeal from the



interlocutory order of the District Court appointing a receiver *pendente lite* that Norsk Hydro did not cause Eriksen's name to be inserted in the blank endorsement on the original bill of sale to Mathiesen until on or shortly before *June 13th, 1921*, and that the document by virtue of which the "Pacífico" was registered as belonging to defendant Eriksen was neither executed nor filed, until on or shortly before *June 13th, 1921*, and that such document was not the original bill of sale to Mathiesen, endorsed in blank, but a new bill of sale, or similar document.

Moreover, such inference is corroborated by the undisputed facts that after the arrival of the "Pacífico" in San Francisco, on *May 24th, 1921*, Mr. Ferrari, one of the directors of plaintiff, in company with Mr. Blake (concerning whose identity see Tr. 80) went on board of the vessel on *May 25th, 1921* with the necessary money and paid the crew what was due them to that date (Tr. 78, 79, 72); and that after the arrival of said vessel the freight moneys earned by her on her voyage to San Francisco were collected, and the disbursements for said vessel and all other usual expenses paid, by the secretary of plaintiff corporation (Tr. 72); and that prior to *May 31st, 1921* the master of the vessel did not know anything about the Norsk Hydro being the owner of the vessel, but thought that C. Henry Smith (the president, general manager and a director of plaintiff corporation) was the owner of her (Tr. 79). All of these facts

point most convincingly to the fact that it was not until on or shortly before *June 13th, 1921*, the date mentioned in Mathiesen's letter of *June 24th, 1921*, that defendants attempted to actually vest in themselves the legal title to said vessel and have her registered in the name of Ericksen.

These facts are also persuasive of the truth of the allegation (contradicted by defendants, Tr. 43) in the petition for appointment of a receiver *pendente lite* that, up to or about *July 15th, 1921*, the master of said steamer obeyed and followed all orders and instructions of plaintiff corporation, but thereafter failed to do so and complied with those of Norsk Hydro instead (Tr. 23, 24). It is also to be borne in mind, in this connection, that it was not until about *July 7th, 1921*, that defendant Eriksen arrived in San Francisco (Tr. 69), and that defendants do not show, either in their pleadings or proofs, the time when they claim possession of the vessel was transferred to them by C. Henry Smith (Tr. 37, 50).

[*Note.* Defendants, in their brief, attach undue importance to the fact that plaintiff filed a libel *in rem* against the "Pacific" on *May 31st, 1921*, joining C. Henry Smith and the master *in personam*, seven days after her arrival in San Francisco. The history of this admiralty proceeding is fully set out in the affidavit of G. W. Bell (Tr. 68 to 73), to which is attached, as an exhibit, a copy of the answer of C. Henry Smith and the master of the ves-

sel to the libel (Tr. 74, 75). It is to be noted that the libel is essentially a proceeding *in rem*—against the ship and all persons intervening for their interests therein. It is what is known in the admiralty as a “Possessory Action,” and is brought for the purpose of quieting possession of the *res*.

“Actions *in rem*, as a general class, comprehend proceedings which also take the name of distinct actions, as (1) possessory; (2) petitory; (3) forfeiture; and (4) prize.”

Betts’ Admiralty Practice, 16.

But, under Supreme Court Admiralty Rule 19, in such a suit

“for the ascertainment of the title and delivery, or for the possession only \* \* \* the process *shall be* by an arrest of the ship *and* by a monition to the adverse party or parties to appear and make answer to the suit.”

267 *Federal Reporter*, XI.

Mr. Benedict says that “the process *must be* by an arrest of the ship *and* by a monition.”

*Benedict’s Admiralty*, 4th Ed., Sec. 328.

It would be perfectly proper, in such an action to proceed against the ship *in rem* and join wholly formal parties *in personam* to comply with this rule.

The libel of plaintiff corporation was filed to determine the right to possession of said vessel (Tr. 68). The vessel had come into this jurisdiction. Defendants were not in this jurisdiction. Plaintiff had discovered that C. Henry Smith, its president

and general manager, who had employed the master of said vessel and who, presumably, had been exercising authority over him on plaintiff's behalf, had been dealing in some secret and unauthorized manner with its ship. Obviously the plaintiff could not run the risk of its ship disappearing from this jurisdiction overnight, under these disturbing circumstances. It took the only available means of protecting its interest and bringing the whole matter to the light of day, and the information and belief on which its secretary verified the libel, were sufficient to justify joining Smith and the master in the libel against the ship. If they were faithful to plaintiff, no harm would be done, and any one asserting an adverse claim to the ship would appear. If they were serving new masters it was high time to find that out, and no better means existed for determining that question. Their answer to the libel does not allege that either of them was in possession of the vessel or withheld possession from libelant, or that either of them claimed title to possession of her. It is as non-committal as it could well be made. The answer was not filed until *July 11th, 1921*, though the libel was filed on *May 31st, 1921*. By that time the libel had brought defendants into this jurisdiction (Tr. 17, 69), plaintiff had gathered something of what had been transpiring behind its back, and filed its complaint herein on Saturday, *July 16th, 1921* and served Mr. Ericksen with process on the following Monday, *July 18th, 1921* (Tr. 70). It may be remarked that

defendants "submitted" to the jurisdiction of the District Court in the present case, as stated in their brief (p. 25) only because Mr. Ericksen was served with process here and they had no alternative.

Plaintiff does not object to the consideration of the libel proceeding as one of the circumstances bearing upon who was in possession of the "Pacífico", but in no sense can it be taken, as defendants seem to urge that it be taken, as a conclusive admission in this case that plaintiff corporation was not in possession of the vessel after *May 31st, 1921*—particularly when the answer to the libel is taken into consideration, and the other circumstances hereinabove mentioned.]

To resume, after the above parenthetical remarks: In *February, 1921*, the book account for the "Pacífico" which heretofore had been entitled "Pacífico", was changed by writing the name California & Oriental Steamship Company above it.

"That was done by Mr. Blake after a talk with C. Henry Smith. Mr. Blake is the book-keeper" (Tr. 80).

The uncontroverted allegations of the complaint establish the fact that none of the acts of Smith or Mathiesen or defendants, relating to the attempted transfer of the "Pacífico" to the defendants were directed or authorized by plaintiff corporation; and the fact that all of such acts were done without the knowledge or consent of plaintiff corporation, and the fact that none of such acts was done for



the account, benefit or use of said corporation, and it derived no benefit therefrom (Tr. 15, 16); and the fact that said steamer was never operated by or at the expense or for the account of Mathiesen, and that at no time has said Mathiesen claimed to operate her, or that she was being operated for his account (Tr. 12, 13).

It is admitted by the answer that defendants *knew when they were dealing with Mathiesen and Smith that Mathiesen was not the beneficial owner of the "Pacifico", but held her in trust* (Tr. 36, 29, 34). But they claim that they *believed* that C. Henry Smith was the cestui que trust under that trust, and

“That *until* long after the occurrence of the matters alleged in the last preceding subdivisions of this Answer” (i. e. subdivision II, Tr. 34-36), “neither of the defendants *had notice or knowledge that said Smith was not the sole beneficial owner of said vessel*, and had no notice or knowledge of facts or circumstances which would have put a reasonably prudent man upon inquiry as to his ownership” (Tr. 36).

Plaintiff, on the other hand, claims that defendants, in their dealings with Mathiesen and Smith, knew and had notice, or had information which was sufficient to put a prudent man upon inquiry which would have led to the knowledge and notice that Mathiesen was trustee of said vessel for plaintiff corporation, and that defendants are mere volunteers (Tr. 14, 15, 16).

Defendants do not claim to be purchasers of the “Pacífico”, but claim that they hold her *as mortgagees as security* to secure the alleged personal indebtedness of Smith arising out of their *del credere* nitrate transactions (answer, Tr. 35, 37; defendants’ brief, 34).

The complaint alleges the value of the “Pacífico” to be in excess of \$350,000 (Tr. 18). The answer denies that she is of a present value approximating that amount (Tr. 32).

There remains to be mentioned, before proceeding to point out the equities of the petition for appointment of a receiver *pendente lite*, the astonishing attempt of C. Henry Smith to wholly ignore the plaintiff corporation as the purchaser of the “Pacífico”, in his affidavit on behalf of defendants (Tr. 50, 56). He says that, on *October 9th, 1920*, the very day on which the resolutions (Tr. 58, 59), quoted above, were passed at a meeting of the stockholders in plaintiff corporation at which C. Henry Smith was present in person, and the minutes of which he signed as president of plaintiff, he and

“certain other individuals” (unnamed) “agreed to associate themselves together in a corporation to be organized under the laws of Norway, for the purpose of purchasing the steamship ‘Pacífico’. \* \* \* That for the purposes of convenience it was agreed by affiant and said individuals to use plaintiff as a temporary organization representing their association, together in the enterprise of purchasing and owning said vessel, but plaintiff itself was not to

have any interest in said vessel. That said individuals agreed to contribute \$60,000 toward the purchase price of said vessel. \* \* \* That the total purchase price of said vessel with the stores and materials upon her, was approximately \$350,000. That it was agreed between said individuals and affiant that the actual purchasing of said vessel and its operation thereafter should be done by affiant, and that a portion of the purchase price should or might be obtained by mortgaging the vessel. That affiant did purchase said vessel from her Japanese owners, but instead of mortgaging said vessel to obtain a portion of the purchase price, he actually paid the full purchase price, to wit, approximately \$350,000 with his own funds. That thereafter said individuals, through the instrumentality of the plaintiff, paid affiant the \$60,000 which they had agreed to contribute toward the purchase price of said vessel as hereinbefore set forth, but with the exception of said \$60,000, affiant has not been reimbursed, and there has not been repaid or tendered to him any part of the purchase price of said vessel so paid by him with his own funds" (Tr. 51, 52).

In view of the above quoted resolutions (Tr. 58, 59), signed by C. Henry Smith, and of his above quoted letters to Chr. Barth and Arthur Mathiesen (Tr. 63-67), his wire to Mathiesen and the latter's reply (Tr. 61, 62), quoted above, to say nothing of the other matters mentioned herein, these statements cannot be given credence, and such must have been the impression made by them on the mind of the Judge below.

This bold attempt to disregard the corporate entity of plaintiff, moreover, as a matter of law,

could never be countenanced by any Court. Courts will sometimes disregard the corporate fiction to prevent or relieve against fraud, but no Court could disregard the corporate entity for the purpose of assisting one to succeed in the course of conduct which the record in this case shows C. Henry Smith to have pursued. A Court of Equity, in particular, cannot countenance such a course of conduct.

Either these statements in the affidavit of C. Henry Smith, and likewise the verbatim allegations in the answer (Tr. 37-40) must be wholly disregarded, or the Court must take them to be C. Henry Smith's lay conception of the relationship existing between a corporation, its stockholders and the corporate property as being that the stockholders are the direct owners of the property in proportion to their stock-holdings, and the corporation is simply a convenient repository for such property. The fact is that the corporation as an entity bought and owned the "Pacifico", separate and apart from its stockholders, and Smith was necessarily a stockholder, since he was president and a director of plaintiff corporation. The same is probably true of the "individuals" to whom C. Henry Smith refers. Or the Court, as another alternative, may take these statements as indicating the inception of a scheme to ultimately accomplish the transfer of the vessel behind the plaintiff's back.

In any event C. Henry Smith's conclusions as to the matter, as stated in his affidavit made after this



litigation had been commenced, cannot override the very minutes of the stockholders' meeting which he signed, or the statements in his letter to Chr. Barth, contemporaneous with the purchase of the ship—particularly: "As the steamer is owned by a company here" (Tr. 65), and "The stock" (i. e. in the proposed Norwegian company) "is to be issued in the name of the California & Oriental Steamship Company, San Francisco, California, as this company is the actual owner of the boat" (Tr. 65),—or the statement in the telegram which he later sent to Mathiesen, without protest: "Inasmuch as steamer 'Pacífico' is owned by California and Oriental Steamship Company" (Tr. 61).

To these observations defendants will reply (defendants' brief p. 12) by saying that plaintiff has not controverted the statements in C. Henry Smith's affidavit. It has been just pointed out that plaintiff has done so. If defendants go further, and say that they should have been controverted in greater detail, the answer is that that is the exact province of the final hearing of this case. Indeed the very words of defendants' brief, concerning the first defense in their answer may also be here applied: "the facts appearing in the pleadings and affidavits on both sides are such that we would not be justified in saying positively that the lower court might not reasonably conclude that there was a fair probability of the plaintiff establishing that a trust existed as to Mathiesen in favor of plaintiff", since that is the whole sum and substance of the above allega-



tions in C. Henry Smith's affidavit, and, consequently, of the information-and-belief third defense to the complaint (defendants' brief pp. 11, 12, 13; Tr. 37, 38, 39).

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**B. THE GROUNDS AND EQUITIES OF THE PETITION FOR APPOINTMENT OF A RECEIVER PENDENTE LITE.**

The defendants are mistaken in saying that the sole ground on which the appointment of a receiver was petitioned for is that just before the commencement of the action the plaintiff was dispossessed of the vessel by the defendants (defendants' brief p. 20).

The petition expressly refers to the allegations of the complaint and by reference incorporates them in the petition as fully in all respects as though again set out in the petition (Tr. 23). It would have seemed only to uselessly encumber the record to physically repeat in the petition the allegations of the complaint.

The grounds and equities for the appointment of the receiver *pendente lite*, are briefly, the following:

1. The constructive trust in defendants by virtue of their acquisition of a trust res, the "Pacífico" from a trustee, Mathiesen, as volunteers with actual or constructive notice that he held her in trust solely for plaintiff and that plaintiff was the sole beneficial owner and solely entitled to the possession and use of her (Tr. 13-18).

2. The hostile claims of defendants to the "Pacífico", which constitute such a cloud on the title and equities of plaintiff and its right to the possession of her as to render operation and use of her by plaintiff impossible pending the determination of the rights of the parties to this suit (Tr. 16, 17, 24).

3. Absence of adequate remedy at law or in admiralty (Tr. 18).

4. Threatened removal of the "Pacífico" from this jurisdiction (Tr. 18, 24) the complaint clearly alleging that both defendants are citizens of Norway (Tr. 10, 11) and that the "Pacífico" is under Norwegian registry (Tr. 11).

5. Threatened subjection of the "Pacífico" to the risk of loss and destruction by perils of the sea and accidents and disasters of navigation while being used by defendants for their own benefit, to the irreparable injury of plaintiff (Tr. 18).

6. The fact that the "Pacífico" is an article of personal property of a special kind, and of unique and individual character, and of special value to plaintiff, and cannot be replaced and her value cannot be estimated or computed with certainty (Tr. 18).

7. The necessity of conserving the "Pacífico" pending final adjudication of the rights of the parties hereto (Tr. 24, 25).

8. Serious depreciation of the "Pacifico" her apparel and equipment by virtue of non-usage, pending final termination of this cause (Tr. 25).

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## II.

### The Argument.

**A. THE SOLE QUESTION UPON THIS APPEAL IS WHETHER THE DISTRICT JUDGE IMPROVIDENTLY EXERCISED OR ABUSED HIS JUDICIAL DISCRETION IN MAKING THE INTERLOCUTORY ORDER APPOINTING A RECEIVER PENDENTE LITE.**

This proposition is not subject to dispute. It will now be pointed out how broad is the scope of the discretion of the lower Court, and how loath an Appellate Court is to review the exercise of that discretion.

The Supreme Court has stated the rule in language peculiarly applicable to the case at bar:

"The only doubt which the Court could have on the question arises from the principle that the appointment and discharge of a receiver are ordinarily matters of discretion in the Circuit Court, with which this Court will not interfere.

"As a general rule, this proposition is not denied. But we do not think it applicable to the case before us. While the parties to this suit were fiercely litigating the amount of the mortgage debt, and questions of fraud in the origin of that debt, the appointment, or the discharge of a receiver of the mortgaged property, very properly belonged to the discretion of

the Court in which the litigation was pending. But when those questions had been passed upon by the Circuit Court, and by this Court also on appeal, and the amount of the debt definitely fixed by this Court, the right of the defendant to pay that sum, and have a restoration of his property by discharge of the receiver, is clear, and does not depend on the discretion of the Circuit Court."

*The Milwaukee & Minn. Ry. Co. v. Soutter*,  
17 Law Ed. 900 at 904.

In the case at bar the parties to this suit are still fiercely litigating their respective rights to the steamer "Pacífico", and questions of fraud in the origin of the rights of the defendants. No more equitable disposition of the subject matter of that litigation could have been devised than the appointment of a receiver to preserve and operate it for the account of whom it might concern, pending the final termination of this suit.

The same principles which apply to appeals from interlocutory orders granting temporary injunctions obviously apply to appeals from interlocutory orders appointing receivers *pendente lite*. This Honorable Court through Mr. Justice Gilbert concisely stated the rule as follows:

"The granting or refusing of a preliminary injunction in such a suit ordinarily rests in the sound discretion of the trial court, and the review thereof by the Appellate Court is limited to the inquiry whether there was an abuse of discretion in granting a writ. This rule has been so often applied by this Court, and is so

well established by precedent as to require the citation of no authorities.”

*Kings County Raisin Co. v. Raisin Co.*, 182

Fed. 60, and

*Worder Mfg. Co. v. Block*, 249 Fed. 750.

On an appeal from an interlocutory order it will of course be presumed that the evidence was sufficient to justify the decree appealed from, unless this record clearly shows to the contrary, and the Appellate Court will not review disputed questions of fact arising from contradictory affidavits.

*King Lumber Co. v. Benton*, supra;

*Railroad Comm. v. Rosenbaum*, 130 Fed. 110;

*Kerr v. New Orleans*, 126 Fed. 920.

**The District Judge Wisely Exercised His Judicial Discretion to Preserve the Existing Status Pending Final Adjudication.**

Bearing in mind the language of the Supreme Court in the Milwaukee & Minnesota Railway case, above quoted, the following language of the Circuit Court of Appeals for the Fifth Circuit is exactly applicable to the present case:

“When issues are joined raising grave questions of law which the Court must decide before rendering a final decree, it is then within sound judicial discretion to preserve the existing status till the case is finally decided.”

*King Lumber Co. v. Benton*, 186 Fed. 458  
at 459.



It is apparent from the record in the instant case that the issues, and in particular the fourth defense pleaded in the answer, raise very grave and complicated questions, not only of our own law, but also of the law of the Kingdom of Norway, which the lower Court must decide before rendering a final decree. In fact, the District Judge below made that very comment from the bench when counsel were arguing concerning the fourth defense in the answer. Moreover no Court would be justified in even attempting to pass upon or determine the merits of the fourth defense of the answer upon the basis of the pamphlet which was introduced by defendants purporting to be published at Christiania, Norway, and entitled "Collection of Norway Laws Published for the Use of the Legations and Consulates 1916-1920".

The appointment of a receiver in the case at bar was necessary in order to at the same time preserve the existing status and yet not uselessly keep the "Pacífico" lying idle in San Francisco Harbor. Defendants' brief (p. 16) states that the remedy of a receiver "is more drastic than the remedy of an injunction *pendente lite* which but stays action by defendant for the purpose of preserving the *statu quo*". Obviously that is not true of the case at bar. Had the lower Court issued an injunction, enjoining the removal of the "Pacífico" from this jurisdiction, and so kept the ship idle, its discretion might well have been open to serious question. The obviously safe, practical and equitable thing to do was

not to allow her to be operated or removed from the jurisdiction by either party during the determination of their respective rights, but to have her operated for the account of the party who might be ultimately concerned, by a receiver under adequate bonds, so that she would at all times be in the custody of the Court. Moreover, the allegation, contained in the plaintiff's petition for a receiver, that the steamer and her equipment are subject to serious depreciation through non-usage is nowhere denied, and must therefore be taken as true.

It is obvious from the facts that plaintiff had no remedy at law or in admiralty, Mathiesen being a trustee of the vessel for it, and that the District Court had complete jurisdiction of all necessary parties and of the subject matter of the trust. Obviously it would be most improvident to allow the very subject matter of this litigation, a ship claimed by foreign defendants, and under foreign registry, to be removed from its jurisdiction, unless in charge of a custodian for the court. Such threatened removal from the jurisdiction is clearly 'adequate justification for a Court of Equity to act. One of the usual statutory grounds for appointing a receiver is the danger of property "being lost, removed or materially injured"'.

*Code of Civil Procedure*, Sec. 564.

And in so far as State statutes authorize the appointment of receivers they will be followed by the Federal Courts.

*Foster Federal Practice*, p. 940.

A receiver may be appointed to provide for the safety of property pending litigation to determine title to it.

*Foster Federal Practice*, p. 937.

Were the ship here involved allowed to be removed from the jurisdiction by defendants, they might well see to it that neither she nor they were in this jurisdiction upon the final determination of this controversy. The plaintiff, if successful in establishing its right to her, would then, at best, be relegated to doubtful relief in a distant and foreign jurisdiction, and would find in its remedy only the seed of new litigation.

Moreover a ship is an article of personal property of a special kind, and of unique and individual character, and her value is not capable of certain computation. Courts of equity, both in this country and in England, upon that ground, have decreed specific performance of contracts for the sale of ships.

*Menier v. Donald*, 165 N. Y. Supp. 50 (collecting authorities, p. 51);

*Batthyany v. Bouch*, 4 Asp. 380.

Once out of this jurisdiction defendants could so keep the "Pacífico" moving from place to place as to make it impossible, as a practical matter, for plaintiff to follow her to effectively enforce a decree of this Court in plaintiff's favor. And she well might be lost by a peril of the sea, while being operated for defendants' benefit—in which event

plaintiff would forever lose this unique and special object of personal property, and so the very goal of this litigation. To allow defendants to expose her to the risk of such perils during this litigation would be most improvident. The argument in defendants' brief to the effect that she is being exposed to such perils by the receiver is specious, because that risk contains the possibility of benefit to plaintiff, whereas operation of her by defendants for their own benefit would be without possibility of benefit to plaintiff.

This leads to the consideration of the protest in defendants' brief that a great hardship was worked upon them by reason of being deprived of the "Pacifico" by this receivership. That protest is sound rather than substance, for it does not appear that defendants were ever entitled to *possession* of the ship, since they admit that they were only mortgagees of her (defendants' brief 34). It does appear that plaintiff collected and disbursed the freights of the vessel on her arrival in San Francisco on *May 24th, 1921*. So whatever possession defendants ever acquired of the ship was acquired very shortly before this suit was filed, and they do not show by their answer or proofs that they will suffer any damage through the operation of this ship by the receiver. The most they attempt to show in this respect is that they *prefer* to operate her themselves.

That the defendants are not in fact prejudiced by the receivership in any way is no more con-



clusively shown than by their refusal to accept the fair and lenient alternative which the District Court offered them, of furnishing a bond conditioned that defendants would abide by and perform all orders and decrees which might be rendered in this suit, and would return the ship to this jurisdiction to abide by and perform the final decree in this cause in the event it should be in favor of plaintiff (Tr. 34). If defendants really desired to themselves operate the vessel, if they had any real or serious objection to her operation by a receiver, here was a simple and equitable manner by which they could do so. All they had to do was to give assurance that they would abide the decree herein and return the ship to this jurisdiction in the event of a final decision for plaintiff. The very fact that these foreign defendants, desiring possession of the foreign registered ship, were unwilling to accept this eminently fair alternative could not but make the District Court the less inclined to let the vessel go out of its jurisdiction. It constitutes a conclusive ground for refusal by this Court to overrule the exercise of the discretion of the experienced District Judge:

“The case is now in the hands of the learned judge below, who heard it upon the merits, and who states in his opinion granting the preliminary injunction that his purpose is to look into the subject anew, and form an individual judgment of his own. We are entitled to the benefit of his views upon the serious question whether or not the defendants’ machines infringe the patent in suit, and upon the merits



of the case generally under the plenary proofs. We therefore will confine ourselves to the single question whether or not the court erred in granting the preliminary injunction. Having regard to the special circumstances, and in view of the proofs to sustain the motion for a preliminary injunction, we are not prepared to hold that the order complained of was improvidently made. *The condition for security imposed upon the complainants and the privilege accorded to the defendants to dissolve the injunction by giving counter security show a cautious exercise by the court of its legal discretion.* We are not convinced that the court erred in granting the preliminary injunction upon the terms prescribed. Therefore, and without intending to intimate any opinion as to the final rights of the parties, we affirm the interlocutory order."

*American Fur Co. v. Cimiotti Co.*, 118 Fed. 839.

In a case where an injunction *pendente lite* was granted, the District Court provided in its order that it should "not issue in case defendants file a bond for \$10,000, with satisfactory sureties, within ten days from date hereof, to secure complainant in that amount for future damages upon final decree which may hereafter be awarded against them". The Circuit Court of Appeals, on an appeal from this interlocutory order, refused to go into the matter and affirmed the order, saying:

"Upon the record presented it is not altogether clear that complainant was entitled, in advance of final hearing, to an injunction immediately stopping manufacture and sale of the devices complained of. *The order below has not*

*interfered with such manufacture and sale, but has only required defendant to give security to respondent, in the event of complainant's ultimate success, for whatever interim damages may accrue. Such security has been given, and defendant's business remains undisturbed. We do not feel disposed to modify such order, nor to discuss the issues presented here on ex parte affidavits in an opinion which might constrain the judge to whom at final hearing the same issues may be differently presented."*

*United Stove Co. v. Silver & Co.*, 128 Fed. 925.

The fact that in that case the alternative was accepted is no distinction in principle.

It is to be always borne in mind, as heretofore pointed out, that the master of the "Pacífico" never heard of the defendants before *May 31st, 1921*, the day the libel was filed against her (Tr. 79), that plaintiff collected the freights and disbursed the ship on her arrival here on *May 24th, 1921*, that, from the copy of the letter delivered to defendants by Mathiesen, dated *June 24th, 1921* (Tr. 76-78), and the other circumstances heretofore adverted to, it would appear that it was only on or about *June 13th, 1921*, that Norsk Hydro placed the name of Eriksen on the bill of sale and had the vessel registered in his name. So it would seem that the remarks and authorities on page 18 of defendants' brief would lead to just the opposite conclusion from that at which they arrive.

## B. CONSIDERATION OF POINTS IN DEFENDANTS' BRIEF.

It is respectfully submitted that what has been said to this point is amply sufficient to show that this Court should affirm the discretionary order of the experienced and able Equity Judge who made it. It is already apparent to this Court that Mathiesen was trustee of the "Pacifico" for plaintiff, that he breached that trust and that the utmost the defendants can *even claim* is that they are mortgagees to secure past and present advances made to C. Henry Smith in his personal capacity with full notice that Mathiesen was a trustee, but without *actual* notice that plaintiff was the *cestui* under that trust.

The general principles governing constructive trusts are familiar to this Court. The following are concise and correct statements:

It is a universal rule, that if a man purchases property of a trustee, with notice of the trust, he shall be charged with the same trust in respect to the property as the trustee from whom he purchased. And even if he pays a valuable consideration, with notice of the equitable rights of a third person, he shall hold the property subject to the equitable interests of such person. Of course a mere *volunteer*, or person who takes the property without paying a valuable consideration, will hold it charged with all the trusts to which it is subject, whether he have notice or not; for in such case no wrong or pecuniary loss can fall upon him, in compelling him to execute the trust to which the property that came to him without consideration was subject.

*Gilbert v. Sleeper*, 71 Cal. 293.

Where a trustee violates or abuses his trust, the cestui que trust has the option to follow the trust property, or that which is substituted for it, and he may subject the latter, in the hands of a voluntary grantee or purchaser with notice, to the discharge of the trust originally imposed upon the trust property.

*M'Clellan v. Pyeatt*, 66 Fed. 845 at 846.

**1. Defendants Were Not Bona Fide Purchasers for Value Without Notice, but Were Volunteers with Notice (Defendants' Brief 26).**

They were not bona fide purchasers for value without notice because they knew Mathiesen only held the "Pacifico" as a trustee.

We ask the Court to carefully review what was said above under the heading "History of the Transactions Involved" about the personal dealings of C. Henry Smith with defendants relating to nitrates.

It is apparent therefrom that the greater part of any consideration for the ship was, at best, antecedent and past. It is also apparent—or at least open to such serious doubt that it should be passed upon after final hearing—that Mathiesen did not make any transfer of the "Pacifico" to defendants in *January, 1921*. What he evidently did was to endorse in blank the original bill of sale running from the original Japanese owners to himself, and deliver it to Norsk Hydro. It clearly appears from Mathiesen's wire of April 21st, 1921 (Tr. 62), that whatever document was delivered to Norsk Hydro at that time *was not a conveyance*



of the "*Pacifico*", but was a mere deposit of a document "*as security*" for Smith's indebtedness. For Mathiesen adds his conclusion:

"They are entitled to have a *clean bill of sale* at any time transferred to them" (Tr. 62).

When or how Norsk Hydro "*caused*" Eriksen's name to be inserted in the blank endorsement does not appear, or when or how or by means of what document Norsk Hydro "*caused* the registered ownership of said vessel to be transferred *from the said Mathiesen* to said Eriksen" (answer, Tr. 37) does not appear. From all of the circumstances, as set forth under the said above heading, it is a fair inference, for the purposes of this appeal, that not long before June 13th defendants received from Mathiesen a "*clean bill of sale*" in order to acquire the legal estate. Therefore at the time defendants received the conveyance, defendants were not purchasers for value and were therefore purchasers *with notice*:

"NOTICE BEFORE CONVEYANCE OF THE LEGAL TITLE.—A purchaser is *not protected* from a prior equity if he receives notice of it at any time *before the conveyance is executed, even though he may have paid the purchase money before notice.*" (Citing numerous cases.)

*Ames Cases on Trusts*, 2d Ed., note, p. 288.

"In order that one may claim protection as a *bona fide* purchaser, the money must have been actually paid *and the conveyance taken* before notice of the trust. If the money is secured, *but not paid*, notice of the trust will convert the purchaser into a trustee, and so if the



money is paid, but the conveyance is not executed, the weight of authority is that notice of the trust will destroy the protection of the purchaser. \* \* \* And so, if he has paid his money but has not yet taken the title when he receives notice, he takes the title subject to all of the equities that attach to it when the conveyance is actually made to him, as he then has a right to refuse the conveyance and to demand back his money."

*Perry on Trusts*, 6 Ed., Sec. 221.

Moreover, as pointed out above, under "The History of the Transactions Involved", in the course of business between Norsk Hydro and C. Henry Smith, defendants "*delivered* nitrates to be sold by him for it upon a *del credere* commission" (Tr. 34). That means that Smith received nitrates which he was to sell for Norsk Hydro to third parties, and that Smith guaranteed payment by such third parties of the purchase price. A "*del credere* commission" is an additional compensation allowed to a commission merchant or factor in consideration of his *guaranteeing the payment to his principal of the debt due from the buyer for goods sold by such factor or commission merchant*.

*Duguid v. Edwards*, 50 Barb. 288, 296;

*Loeb v. Hellman*, 83 N. Y. 601, 603;

*Ruffner v. Hewitt*, 7 W. Va., 585, 604.

It does not appear from the record that the purchasers who bought the nitrates from Norsk Hydro through Smith have not paid the full purchase price therefor, or that all of such nitrates have been sold.

True, the answer states that Smith “became indebted”, but this is a mere conclusion of law. Hence defendants, at least for the purpose of this appeal, are not purchasers *for value*.

Furthermore, as has been pointed out above, when defendants took from Mathiesen whatever documents they did take, they *admittedly knew that he was trustee of the “Pacifico”*. They, therefore, had notice that there was a trust, and they cannot found any right arising out of absence of notice upon the contention that they *thought* someone was the cestui of that trust who was *not so in fact*. Defendants’ contention would lead to this result: A is trustee of property for B. C, a friend of A, arranges with A that C will establish an open account with D, and instead of paying it, A will transfer to D the trust property. A does so, D knowing that A holds the property in trust, but supposing that he held it for C. No more dangerous principle could be suggested than to say that D takes free from the trust. This Honorable Court, speaking through Mr. Justice Gilbert, clearly summarizes the principles which protect the innocent cestui, B:

“There can be no doubt that the use of the word ‘trustee’ in the conveyance to T. J. Watson was sufficient to put all subsequent purchasers from him *upon inquiry as to the existence and nature of the trust*. Railroad Co. v. Durant, 95 U. S. 576, 24 L. Ed. 391; Shaw v. Spencer, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; Covington v. Anderson, 16 Lea (Tenn.) 310. The rule applicable to such a case is well expressed by the Circuit Court of Appeals for the

Eighth Circuit in Geyser Marion Gold Min. Co. v. Stark, 106 Fed. 558, 45 C. C. A. 467, 53 L. R. A. 684, in which it was said of the use of the word 'trustee':

" 'It is a *warning and declaration* to every one who reads it (1) that the person so named is not the owner of the property to which it relates; (2) that he holds it for the use and benefit of another; and (3) that he has no right or power to sell or dispose of it without the assent of his cestui que trust. It denies the equitable ownership and beneficial interest of the party to whom it is applied, and asserts that he holds it in a representative capacity. It signifies the opposite of the word 'owner', and means that, while the party called 'trustee' has the naked legal title, he has no beneficial right, title, or interest in the property. \* \* \* Hence the legal presumption is that a trustee has no power to sell or convey the property which he holds in his fiduciary capacity, and the fact that he holds it as trustee is a warning and a declaration to all the world that he is without the power of disposition unless that power is specifically, given by the instrument creating the trust, or by the assent of those whom he represents. The legal presumption is that a trustee has no power of sale. Jaudon v. Bank, Fed. Cas. No. 7, 230; Gaston v. Bank, 29, N. J. Eq. 98, 103; Duncan v. Jaudon, 15 Wall. 165, 175, 21 L. Ed. 142.'

"The mortgagee of the mortgage made by Watson and all subsequent purchasers were bound to exercise reasonable diligence to ascertain whether or not the equitable owners of this real estate had authorized the execution of a mortgage. *The investigation and inquiry that were made fall far short of what the law requires.* No inquiry whatever appears to have been made by the original mortgagee or by his assignee, nor by any of the purchasers, until the purchase which was made by the defendant

Batchelder. The extent of his investigation was to ascertain that no declaration of trust was of record, *and to inquire of the grantor of Watson, who informed him that he did not know that the word 'trustee' was in the deed, and of Milton W. Smith, the attorney for the person from whom he purchased, who informed him that he knew of no one having any claim on the property. No inquiry was made of T. J. Watson, and no effort, so far as the testimony shows, was made to communicate with him. He, of all persons whose names appeared on the records, best knew the facts, and the contingency that he might have denied the trust was no excuse for failure to make inquiry of him."*

*Sternfels v. Watson*, 139 Fed. 505-507.

The citation of further authorities is unnecessary. In the case at bar there is not even an *allegation*, let alone an iota of evidence, showing or even tending to show that defendants or either of them *ever asked Mathiesen who was the cestui of his trust* of the vessel, or whether, if C. Henry Smith was interested, there was also someone else interested. In the above case decided by this Honorable Court, it was held that although the purchaser investigated and found that the trust was not of record, and although he made inquiry of a grantor of the property, and of the attorney for the person from whom he purchased, the purchaser took the property subject to the trust of which he did not know. It *held* that the least he should have done was to make inquiry of the *trustee himself*, and that the contingency that the trustee *might* have denied the trust was no excuse for failure to make inquiry of him.



The Court cites the leading English case of *Jones v. Williams*, 24 Beav. 47, for this proposition. In that case a mortgagee knew that there were "charges" affecting the property. He made inquiry and discovered *two* charges, but no more. There was *another*. The Court held that he could not claim to be a purchaser without notice of such other charge, *and that he was bound to inquire whether there were any others, and that where he made no inquiry it could not be surmised that a false answer would have been given if an inquiry had been made, or such an answer as would have precluded the necessity for any further inquiry.*

It is apparent from these authorities that, at least in this jurisdiction, B, in the case above supposed, would be protected as against D. D, knowing A was a trustee, was at least at his peril to inquire of A for whom he held as cestui. In the case at bar defendants were at their peril to at least inquire of Mathiesen, who was the cestui of his trust, and defendants will not now be heard to *surmise* that if they had inquired of Mathiesen he would have replied that C. Henry Smith was the cestui.

**2. The Plaintiff Is Entitled to Recover Without Paying or Offering to Pay Anything (Defendants' Brief 35).**

It has been shown above under the heading "The History of the Transactions Involved", that the foundation in the record on which defendants build the argument under Division III of their brief (p. 35) will not support it. The allegations of the an-



swer on which this argument are based are on information and belief, only and the only support in the record for them is to be found in the verbatim statements in the affidavit of C. Henry Smith (defendants' brief 11, 12). As has been pointed out, the facts in that affidavit are not entitled to credence, and hence the same is true of the information—and—belief allegations in the answer.

But, even admitting those allegations for the purpose of argument, one of them is: "*That plaintiff itself was not to have any interest in said vessel*" (Tr. 37). And in the first defense to the complaint, which defendants *for the purpose of this appeal only*, abandon (defendants' brief 6), but which, as evidentiary matter is inextricably interwoven with the third defense, defendants positively deny that Mathiesen ever held the vessel in trust for plaintiff. And in the second defense it is positively alleged:

"That said A. Mathiesen accepted and held the registered ownership of said vessel as aforesaid *in trust for said Smith* as the sole beneficial owner and for no one else" (Tr. 33).

How, in view of these facts, defendants can now contend that plaintiff, as a condition precedent to the relief sought in this case, must make tender to them of money *which both defendants and Smith still assert was not advanced for plaintiff's account*, is incomprehensible. It is the less comprehensible in view of the fact that defendants' position is that, *so far as the receivership pendente lite is concerned* they abandon the contention that Smith was in fact

the cestui of the trust, but not the right to make that contention *on final hearing* (defendants' brief 6, 7).

In short, defendants say, in one breath, 'if you had offered to pay us we would have refused it, because Mathiesen never held the vessel in trust for you, and on final hearing we will show that fact, but, useless as tender may have been, you should have made it.' But that will not do. It is axiomatic in law that one is excused from tendering performance when the other party, by word or conduct, says in advance that a tender would not be accepted. Equity, likewise will not require the doing of a useless act.

The astuteness with which the District Judge exercised his discretion is thus again demonstrated, for he said that such rights as Smith or defendants might have, in the event of the plaintiff establishing on final hearing that Mathiesen was in fact trustee for plaintiff, and that defendants were not bona fide purchasers for value without notice, could be protected by the final decree, which could be so moulded as to require payment by the plaintiff as a condition of recovering the vessel, should that prove proper (defendants' brief 38, 39).

Moreover, it is to be borne in mind that, as pointed out heretofore, the record does not show that defendants ever contemplated *possession* of the "Pacifico"—any more than a mortgagee of real property contemplates having possession of the

mortgaged property. And, so far as the alleged advance of Smith to plaintiff is concerned, *assuming* that plaintiff under any circumstances was to pay to him funds which he put into the vessel, plaintiff no doubt expected and contemplated *to earn the funds necessary to make that repayment by having the possession and use of the vessel*—just as a farmer who mortgages his farm, expects to pay the mortgage through the earnings he receives through using the farm.

**3. The Trust Which Plaintiff Is Seeking to Enforce Is Not One Illegal Under the Norwegian Law, Nor Is the Transfer Which the Plaintiff Seeks to Compel Prohibited by that Law** (Defendants' brief, 42).

This contention of defendants merits no attention on this appeal. When it was advanced in the District Court the Judge said that so complicated a matter could only be passed on at the final hearing. This is in accord with what was said in *King Lumber Co. v. Benton*, quoted *supra*. So far from being a ground for reversing the discretionary order of the lower Court, the obviously difficult questions involved are a ground for commending that order.

It is not to be presumed that Mathiesen, or plaintiff, or Smith breached, or intended to breach the laws of Norway. Moreover it is apparent from the record that they did not intend in fact to do so. The resolution of the stockholders' meeting signed by Smith on *October 9th, 1920*, specifically recited that the purchase of the steamer and the holding

of her by a corresponding owner in Norway was to be "*according to law there*" (Tr. 59). The letter from Smith to Barth on *October 23d, 1920*, clearly shows that the parties intended to comply with the Norwegian law in having a Norwegian hold the registered ownership of the vessel for an American corporation—particularly as Barth was a *Norwegian attorney* (Tr. 63-65). The same thing is true of the letter from Smith to Mathiesen dated *October 25, 1920* (Tr. 66). Mathiesen, as is apparent from the facts referred to in Smith's letter to him on *October 25th, 1920*, would not have taken the title to the vessel if doing so had constituted a breach of Norwegian law.

Referring to the sections of the Norwegian pamphlet referred to in defendants' brief pages 43 and 44, it is to be noted that *Sec. 2* expressly provides that the "government department concerned *may grant dispensation from the prohibition provided by Sec. 1*". It is not to be assumed for a moment that the government department would not grant dispensation from such prohibition under the circumstances involved in the case at bar, where the *res* involved in the trust in dispute is within the territorial jurisdiction of this Court, and where all of the parties interested in the litigation have been properly served in this jurisdiction and are before this Court. The title and disposition of personal property is governed by the law of its *situs*, as is well established and any theoretical *situs* at-

tached to domicile surrenders to actual *situs* where justice and convenience demand it.

*New Orleans v. Stempel*, 44 Law Ed. U. S. 174  
at 179.

In the present case the actual *situs* of the "Pacific" is San Francisco and there is no occasion for resorting to any fictitious *situs* of domicile. In any event justice and convenience would make any such fiction surrender to the actual *situs* in the case at bar.

It is respectfully submitted that the affidavit of G. W. Bell with reference to this contention on the part of defendants (Tr. 73) is entirely sound. The provisions contained in the pamphlet do not purport to cover a transfer of a ship under process of a court having competent jurisdiction of the vessel and also of all parties interested in her.

Whether the provisions contained in the pamphlet represent Norwegian law is not proved. The pamphlet is not relevant so far as proof of Norwegian law is concerned, and it is obviously incomplete. Moreover it is even less relevant as proof of what the Norwegian law was at the times herein involved, since it purports to have been passed in 1917 whereas the transactions involved in this case took place in 1920.

The language of Sec. 1 contained in the pamphlet is that a ship or a share in a ship entered in the registry of Norwegian ships or for which a provisional certificate of nationality has been issued, must



not be transferred *in any form whatever* to any person who cannot be the owner of a Norwegian ship.

The holding in trust of a Norwegian ship by a citizen of Norway for a person who cannot be the owner of a Norwegian ship, is not a *transfer* either of the ship, or of a share in the ship. If permission could not be secured from the Norwegian government under the provisions of Sec. 2 quoted in the pamphlet, it would be quite possible for this Court to appoint a Norwegian citizen to hold the ship in trust for plaintiff corporation. But the provisions of Sec. 2 are a sufficient answer to defendants' contention in and of themselves.

Nothing can better illustrate, perhaps, the fallacy of the arguments of defendants than the quotation of the English authorities of *Ex parte Yallop* and *Ex parte Houghton*. Were they to be relied upon as representing the English law in 1920, the court would be misled, as the latest edition of *Lewin on Trusts*, 12th Edition, page 187, after citing these two cases, says:

“The law has, however, now been modified so as to allow of a beneficial interest in a ship in persons not appearing on the register, and under the Act now enforced, although no notice of trust is allowed on the register, equitable interest may be enforced by or against the register, equitable interest may be enforced by or against the registered owners and mortgagees of ships, or in respect of their interest therein, in the same manner as they may be

enforced in respect of any other personal property and it follows that if a ship be purchased by A in the name of a stranger there will be a resulting trust in favor of A."

The author then cites the various statutes showing the modification in the law, and also the case of *Chasteauneuf v. Capeyron*, 7 App. Cas. 127.

Finally, in answer to this contention of defendants it is to be noted that the very ship here in question was transferred by her Japanese owners to a Norwegian.

As suggested above, the defendants imaginary difficulties of making transfer of the vessel to plaintiff in the event of a decision on final hearing that plaintiff is entitled to the vessel, could very simply, in any event, be avoided through the Court either requiring defendant Eriksen to make transfer to some Norwegian citizen as trustee for plaintiff, or through requiring defendant Erickson himself to hold the vessel in trust for plaintiff, or through having the transfer made by a commissioner appointed by the Court, which would avoid the necessity of defendants doing any act relating to the transfer.

It is respectfully submitted that this Honorable Court, should affirm the very conscionable and astute exercise by the experienced and able Equity Judge of the District Court of his discretion in granting the interlocutory order appointing a receiver *pendente lite* in this suit, particularly after the defend-

ants had refused to accept the reasonable and lenient alternative which was extended to them.

Dated, San Francisco,

October 22, 1921.

Respectfully submitted,

LOUIS FERRARI,

BELL, SIMMONS & CREECH,

*Attorneys for Appellee.*

GOLDEN W. BELL,

*Of Counsel.*



No. 3758

IN THE  
**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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NORSK HYDRO ELEKTRISK KVAELSTOF AKTIE-  
SELSKAB (a corporation) and BJARNE ERIK-  
SEN (an individual),

*Appellants,*

vs.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY  
(a corporation),

*Appellee.*

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**REPLY BRIEF FOR APPELLANTS.**

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MCCUTCHEM, OLNEY, WILLARD, MANNON & GREENE,  
McCLANAHAN & DERBY,

*Attorneys for Appellants.*

WARREN OLNEY, JR.,  
*Of Counsel.*

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No. 3758

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIE-  
SELSKAB (a corporation) and BJARNE ERIK-  
SEN (an individual),

*Appellants,*

VS.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY  
(a corporation),

*Appellee.*

## REPLY BRIEF FOR APPELLANTS.

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This brief is filed pursuant to leave of court obtained at the time of the oral argument. We have endeavored to make it strictly a reply to matters advanced by counsel for the plaintiff (the appellee) in its brief.

The primary proposition which counsel advance in support of the order of the lower court is that the appointment of a receiver is a matter of discretion and the action of the lower court will not be reversed on appeal except for an abuse of discretion. No question can be made as to the correctness of the rule so stated. But neither can any question be made that the discretion

so entrusted to the chancellor is not an arbitrary but a judicial discretion—one controlled by established principles and to be exercised only in accordance with those principles and within the limits fixed by them. If this be true, as it manifestly is, then if a receiver is appointed not in accordance with the established principles governing such appointments, and in a case without the limits fixed by those principles, it is plain that there has been an abuse of the discretion entrusted to the chancellor and his order should be reversed. Our claim is that such an abuse occurred in the present case; in other words, that the order of appointment under review was made in violation of the established principles governing the appointment of receivers.

Such being our contention, two primary questions present themselves: first, what are the established principles governing the appointment of receivers? and, second, were those principles violated in the case before the court?

As to what the established principles governing the matter are, plaintiff's counsel in their brief do not take substantial issue with our statement of them. It is necessary, however, to repeat them in order that they may be in mind in discussing the question of their violation. Those principles are: that the courts are very loath to appoint a receiver *pendente lite* and a clear case for such an appointment must be made out—this because of the drastic character of the remedy as a provisional remedy; that this is particularly true as to an appointment which deprives a defendant having the legal title of the possession to which presumptively he is entitled



because of his legal title; and that a receiver will not be appointed against such a defendant unless three conditions concur. These three conditions are: (1) that there must be grave danger that unless a receiver is appointed the subject-matter of the action will be injured or destroyed, or a judgment for the plaintiff, if one finally be given, be rendered inefficacious or unenforceable; (2) that such injury or destruction will irreparably injure the plaintiff—something which can rarely be the case where the defendants are fully able to respond to any judgment against them, and (3) that upon the pleadings and preliminary proofs there is a strong probability that the plaintiff will ultimately recover.

In the present case the defendants admittedly have the legal title and possession. It is so alleged by the plaintiff itself (Tr. pp. 13 and 23). The three conditions last above stated must therefore appear in the present case in order to justify the appointment appealed from. Our claim is that not one of them is present.

We believe that what we have said in our opening brief as to the nonappearance or nonexistence in this case of the first two conditions mentioned is sufficient and that what is said upon this point by plaintiff's counsel does not require reply. We believe that it plainly appears that a receiver was not asked for and was not appointed in order to avoid injury to or loss of the vessel through her exposure to the perils of the sea, for the simple reason that under the management of the receiver she is exposed to those very same perils. We believe likewise that it plainly appears that a re-

ceiver was not asked for or appointed because of any danger of the court's losing jurisdiction or of its judgment being rendered inefficacious or unenforceable through the vessel being sent to sea by the defendants and thus removed without the territorial limits of the court's jurisdiction, because the court's jurisdiction is not dependent upon the presence of the vessel within this jurisdiction, and there is no allegation either that the defendants intend to remove the vessel to defeat the court's jurisdiction or evade any judgment against them, or that they are not fully able to respond to any such judgment, or have not property within this jurisdiction out of which it can be satisfied. We believe likewise that a reading of the plaintiff's petition (Tr. pp. 23-25) will make it plain that the ground upon which a receiver was asked was that the plaintiff had been in possession of the vessel up to July 15, 1921, just four days before the commencement of the action, when the plaintiff was dispossessed by the defendants, and that under these circumstances the defendants should not be permitted to have possession of and to operate the vessel during the pendency of the action. We likewise believe that it is plain that this ground did not in fact exist; that the plaintiff did not in fact have possession as alleged, and was not dispossessed by the defendants. We believe that this plainly appears because of the fact that for a month and a half prior to the 15th day of July, 1921, the plaintiff had been endeavoring to secure possession of the vessel by a libel in admiralty wherein the plaintiff averred under oath that possession was withheld from it and a recovery of possession was

sought, and because of the further fact that the captain of the vessel avers positively and without contradiction that up to the time of the institution of this libel he had never even heard of the plaintiff.

We believe likewise that it plainly appears that the plaintiff will not be irreparably injured, or for that matter injured at all, by the defendants' retaining possession of and operating the vessel, for it appears affirmatively that the defendants are not only not insolvent, but are amply able to respond to any judgment against them.

We desire by this brief to reply to certain points advanced by plaintiff's counsel in connection with the third condition which must appear in order to justify the appointment under review. That condition is, to repeat, that it must appear that there is a strong probability that the plaintiff will ultimately recover. We assume, for the purposes of this appeal, that the plaintiff's contention is correct that the vessel was originally purchased from her former Japanese owners by one C. Henry Smith for the plaintiff, or (what is the same thing), that the lower court was justified in concluding that the plaintiff would probably be able to establish that fact. But even so, our contention was and is that there is no probability of the plaintiff's ultimately recovering for three reasons, all of which, we submit, appear without contradiction in the pleadings and proofs before the court. These are: First, that the defendants were *bona fide* purchasers of the legal title for value and without notice of the trust which the

plaintiff seeks to enforce; second, that even if they were not such purchasers, but stand merely in the shoes of Smith and subject to the same equities to which he was subject, yet it appears that the vessel was purchased by Smith with his own funds, and that out of a total purchase price of \$350,000 paid by him, Smith has not been reimbursed for \$290,000, so that, even as against Smith, the plaintiff would not be entitled to enforce the trust under which it claims except upon the payment of this \$290,000 which it has not offered to do or expressed its willingness to do; and, third, that the trust which the plaintiff seeks to enforce is illegal because created for the purpose of evading the laws of Norway, to which the title of the vessel is subject, and that its enforcement now will be in direct violation of those laws.

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**THE DEFENSE THAT THE PURCHASERS ARE BONA FIDE PURCHASERS OF THE LEGAL TITLE FOR VALUE AND WITHOUT NOTICE OF THE TRUST WHICH THE PLAINTIFF SEEKS TO ENFORCE.**

As to the first of these reasons or defenses, there is no substantial contention by plaintiff's counsel that the defendants did not purchase the vessel, or (more accurately) take legal title to her as security, for a valuable consideration and without actual notice of the plaintiff's equity, at the time the defendants advanced the consideration and took the bill of sale for the vessel from the registered owner. Plaintiff's substantial contentions are: (1) That because the transfer of the vessel to the defendants was not actually entered upon the

registry until after the defendants had notice of the plaintiff's equity, the defendants are charged with such equity, and (2) that the defendants had constructive notice of the plaintiff's equity.

As to the first of these contentions, it might possibly be inferred from the brief of counsel that they contend that the actual conveyance of the vessel was not made until long after January 21, 1921, and at a time when it appears that the defendants had actual notice of the plaintiff's claim. The authorities which they cite are, for example, to the point that a purchaser is not protected from a prior equity if he receives notice of the equity prior to receiving the conveyance, even though he has previously and without notice paid the purchase price. We can not believe that counsel intend to claim that the actual conveyance of the vessel was made subsequent to January 21, 1921. Such a contention would be contrary to the allegations of their own complaint (see paragraph VI of the complaint, Tr. p. 13), which are to the effect that in January, 1921, the bill of sale for the vessel was endorsed and delivered by the registered owner to the defendants who subsequently had the registered ownership changed thereunder. These allegations also are in accord with all the proofs in the case and are unquestionably the facts. There is, furthermore, nothing whatever in the proofs to contradict or abut the positive averments of the defendants that when they took the bill of sale in January, 1921, they had neither actual notice or knowledge of the plaintiff's claim. As stated in our opening brief, the facts of the transaction are such as to make it well nigh



incredible that the defendants had any suspicion at that time that any one other than Smith had a beneficial interest in the vessel. The case, then, is one wherein the conveyance was executed before actual notice to the defendants, but was not entered upon the register until after such notice.

It would seem plain enough that such a purchaser is not affected by notice received at such a time. A wholly analogous case is that of one purchasing real property and taking a conveyance without notice of an equity existing against his grantor, but failing to record the conveyance until after he receives notice. The essence of such a transaction is that the purchase is complete and the title actually passes upon the execution of the conveyance, and, therefore, before notice received by the grantor. The failure to record the conveyance does not affect either the completeness of the purchase or the passage of the title, and, the purchase being complete and the title having passed before notice of the equity, the purchaser will be protected against the equity although he fails to record his conveyance until after notice received by him. The following authorities are directly to that effect.

*Warnock v. Harlow*, 96 Cal. 298;

*Noyes v. Crawford*, 118 Iowa 15; 91 N. W. 799.

In fact, even though the purchaser does not obtain the legal title, but acquires merely an irrevocable power of obtaining it in a manner which does not require action by the grantor, the purchaser will be protected although he receives notice of an equity before actually

obtaining the title. The matter is discussed by Professor Ames in

*1 Harvard Law Review*, at page 5.

He cites, among other authorities, in support of his position:

*Dodds v. Hills*, 2 H. & M. 424; 70 Eng. R. R. 528, which fully bears him out.

The second contention of plaintiff's counsel, namely, that the defendants are charged with constructive notice that the registered owner held the title in trust for the plaintiff and not for Smith, as the defendants supposed, is based upon the fact that the defendants knew that the registered title was held upon a trust. In support of their position, counsel cite

*Sternfels v. Watson*, 139 Fed. 505,

wherein the purchaser of a title held by one as "trustee" who failed to inquire of the person described as "trustee" as to the actual existence of a trust was held by reason of his failure to make such inquiry to be chargeable with notice of a trust which did in fact exist. This case expressly proceeds upon the theory that the "trustee", of all persons, was the one who should best know the facts and of whom inquiry should, therefore, be made. We have no quarrel with this ruling. Manifestly it can have no application where it appears either that the trustee has already made a representation to the purchaser as to the character of the trust, or that the inquiry, if made of the trustee, would not have disclosed the equity with which it is sought to charge the purchaser. In the one case the inquiry is already an-

swered by the representation made by the trustee, and in the other case it appears that the inquiry, if made, would have been futile. In the present case no more effective representation could have been made by the registered owner to the defendants that he held the registered title in trust for Smith than his recognition of Smith as the beneficial owner, a recognition plainly made to the defendants by his taking and following the instructions of Smith to transfer the vessel to them as security for Smith's debt.

It also appears that if any inquiry had been made of the registered owner it would have disclosed merely that he knew no one but Smith in the matter and held the registered title, subject to his sole direction. This appears from the letter of Mathiesen, the registered owner, to the Bank of Italy, introduced in evidence by the plaintiff. The substance of the letter reads:

“As you may have been able to understand, it was exclusively at the request of Mr. Smith in his telegram of the 20th April, reading: ‘Inasmuch steamer Pacifico is owned California and Oriental Steamship Co., please cable direction that such is the fact that you are the representative of this company’; that on the following day I acknowledged his notification. I found it, however, at the same time expedient to make a mention of the fact that, according to his instructions, the Bill of Sale which, in due course, had been received by me had, on the 21st day of January, 1921, been deposited in original with The Norsk Hydro Elektrisk Kvaelfaktieselskap (endorsed in blank).

“Under contract of the 11th October, 1920, S/S ‘Pacifico’ was sold by Uchida Kisen Kabushiki Kaisha, of Kobe, to Mr. Smith, who requested me

to be so kind as to have the vessel transferred to the Norwegian Flag with me as chartered owner. All instructions in connection with this vessel have been given me by Mr. Smith, and also all correspondence been signed by him personally, and as it moreover was he who appointed me, it is a matter of course that I had neither right, occasion nor reason to fail to conform with his instructions. On the contrary, I was bound to do so. How far Mr. Smith has gone beyond his power is unknown to me, and has nothing to do with me.”

(Tr. p. 77.)

The fact of the matter is that, assuming that Smith purchased the vessel for the plaintiff, the plaintiff yet permitted her registered title to be put in the name of Mathiesen, to be held by him subject solely to the control of Smith, and with Mathiesen knowing but Smith alone. In other words, the plaintiff has permitted Mathiesen and Smith between them to be clothed with all the indicia of the legal and the beneficial ownership. Under such circumstances, if Mathiesen and Smith have acted wrongfully in transferring the vessel to the defendants and either the plaintiff or the defendants must suffer because of this wrong, the loss must fall on the plaintiff, who made it possible for Mathiesen and Smith to deal with the vessel as they did, and not upon the defendants, who are in no wise responsible for the creation of the conditions which made the wrong possible.

**THE DEFENSE THAT THE PLAINTIFF CANNOT RECOVER THE VESSEL WITHOUT REPAYING THE \$290,000 OF THE PURCHASE PRICE WHICH SMITH ADVANCED AND FOR WHICH HE HAS NEVER BEEN REIMBURSED.**

The reply of plaintiff's counsel to the defense above stated is three-fold. The first is that the fact that Smith paid \$350,000 for the vessel out of his own funds and had not been reimbursed for \$290,000 thereof appears only by the affidavit of Smith and that Smith is not entitled to credence. *But this reply is not open to the plaintiff.* The plaintiff's own evidence shows that it knew before the purchase that the price of the vessel was to be approximately \$350,000 (see minutes of directors' meeting appearing on page 58 of Tr.). Plaintiff also certainly knew how much, if anything, it had paid on account of this purchase price. If Smith's averment that he had paid the full amount out of his own funds and had been reimbursed only to the extent of \$60,000 was not true, *the plaintiff knew it.* The plaintiff nevertheless allowed the averment to go wholly uncontradicted, and having done this it cannot now claim on appeal that the averment is not true. No such claim was made in the lower court, and we relied upon the fact that the averment was not contradicted and assumed that no question was made in regard to it. We feel justified in saying that if question had been made, the truth of the averment could have been conclusively shown by evidence wholly independent of Smith. The fact is that the vessel was paid for by drafts purchased by Smith from the Bank of Italy with funds from his own personal bank account with that bank. This fact



could have been easily shown by the documents themselves and the books and letters of the bank, if any question as to the fact had been made. We might add that the failure to contradict the averment was not through an inadvertence or oversight. The facts now questioned are not only alleged in Smith's affidavit, but are set up in the defendants' answer as a separate and special defense, so that they were given a prominence and importance such that they could not be overlooked. We submit that it must be taken that Smith paid for the vessel from his own funds and has not been reimbursed in the amount of \$290,000.

The second reply of the plaintiff is that any tender by it of the \$290,000 would have been futile in view of the denial in the defendants' answer that the vessel was purchased by Smith for the plaintiff. But it does not follow for a moment that because the defendants deny that Smith purchased the vessel for the plaintiff they would have refused a tender of \$290,000. They certainly would not have refused it if that sum were any where near the value of the vessel. So long as they receive that value, or somewhere near it, it is wholly immaterial to them, or to Smith either for that matter, whether Smith originally purchased the vessel for the plaintiff or not. It does not appear in the record just what the vessel was worth at or just prior to the commencement of the litigation. Plaintiff alleges that she is worth approximately \$350,000 and the defendants deny that she is worth that sum or anything like it. The point is that if there were circumstances excusing the plaintiff from making the tender which otherwise it

should have made as a condition of its right to maintain its action, it rested upon the plaintiff to show those circumstances. One of those circumstances would certainly be that the sum of \$290,000 was not so near the value of the vessel as to make the tender of that amount an inducement to accept it and avoid dispute and litigation. What the actual fact of the matter is as to the unlikelihood of the defendants' rejecting such a tender, and how probable it is that if tender had been made it would have ended all dispute and avoided this litigation, may be gathered from the fact, of which because of its common notoriety we believe the court may take judicial notice, that in the last few months and since the purchase of this vessel for \$350,000 the value of shipping has fallen enormously.

A still further and, if possible, more conclusive reply to the argument that such a tender would have been futile is the fact that the plaintiff does not aver its willingness even now to pay the \$290,000 which it unquestionably must pay as a condition of the relief it seeks. We have no hesitation in saying that it is not willing to pay it and will not do so. Whether the plaintiff made a tender or not, or whether, if made, such tender would have been futile, is immaterial unless the plaintiff was and is willing to pay the \$290,000 which it must pay in order to recover the vessel from Smith or the defendants. Unless the plaintiff is willing to do this, it has no cause of action against the defendants, for certainly it will not be permitted to harass the defendants and occupy the time and attention of the courts with litigating what must finally lead to a futile and fruit-

less decree. So that the matter may be brought to a head, we now say formally that if the plaintiff will aver its willingness to pay \$290,000 as a condition of recovering the vessel, we will consent to a decree that it do recover her upon that condition, subject only to obtaining the consent of the Norwegian government to the transfer, a consent to obtain which every effort will be made.

The third contention of the plaintiff is that the defendants held the legal title to the vessel as security only, i. e., as mortgagees, and that the record does not show that they ever contemplated possession. We do not see the materiality of this, but in any case a complete reply is that the defendants actually had possession, whether they originally contemplated having it or not, so that at the commencement of the litigation and when the receiver was appointed they occupied the position of mortgagees holding the legal title and in possession. As such mortgagees they were unquestionably entitled to retain possession. In this connection we would emphasize again the injustice of taking the possession of the vessel from the defendants by the appointment of this receiver at the instance of the plaintiff when it appears from the uncontradicted facts that the defendants are entitled to that possession of which they are deprived by the appointment and the plaintiff cannot recover the vessel, until it pays \$290,000 which the plaintiff has neither offered to pay or averred its willingness to do so. What rhyme or reason was there in appointing a receiver to take possession of the vessel in order to protect the rights of the plaintiff when the

plaintiff had no right to possession except upon compliance with a condition which it had not offered to comply with, or even averred its willingness to comply with? Surely there was nothing wrongful in the defendants' possession under such circumstances, and, if there was nothing wrongful, what possible justification is there for appointing a receiver to take possession from them?

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**THE DEFENSE THAT THE TRUST UNDER WHICH THE PLAINTIFF CLAIMS IS ILLEGAL BECAUSE CREATED TO EVADE THE NORWEGIAN LAW, AND THAT THE RELIEF WHICH THE PLAINTIFF SEEKS WOULD BE IN VIOLATION OF THAT LAW.**

The first contention of plaintiff's counsel in regard to this defense is that the matter is so complicated that its consideration was properly postponed to the time of final hearing.

An immediate reply to this is that even if the matter were complicated, the burden rested upon the plaintiff to show a clear case for the appointment of a receiver and, as an incident of this, to make it appear that it was probable that the plaintiff would ultimately recover. This the plaintiff did not do, if upon the proofs submitted the matter appeared to be so complicated that the rights of the parties could not be determined. It is novel doctrine indeed that the defendants, having the legal title and presumptively rightfully in possession, may be dispossessed by the appointment of a receiver simply because the matter is so complicated that the court cannot easily determine

what the probable ultimate rights of the parties are. If the plaintiff's right upon the pleadings and preliminary proofs is not reasonably clear, it is not entitled to a receiver.

A still further reply, however, is that the matters presented by this defense, so far from being complicated, are exceedingly simple. The fact upon which the defense is predicated is that the Norwegian statutes forbade and now forbid any vessel obtaining or having a Norwegian register unless Norwegian owned, and likewise forbid any transfer whatever of a Norwegian vessel to one who is not qualified to own such a vessel, i. e., to one not a Norwegian. The question of fact, therefore, is as to the existence of such statutes. There is certainly nothing complicated about that question, and, on its being shown that such statutes exist, the remaining questions are wholly as to the legal consequences which follow. They are pure questions of law.

Plaintiff's counsel also contend that the existence of the statutes mentioned was not shown, for the alleged reason that it was not proved that the contents of the pamphlet introduced in evidence and purporting to give the text of the Norwegian statutes did in fact give such text. The answer to this is, first, that the pamphlet purports to be printed under governmental authority so that it proves itself, so to speak, and, second, that it was admitted in evidence without objection or question, so that its authority cannot now be questioned upon appeal. On the title page, inside the cover, appears the following:



"COLLECTION  
 OF  
 LAWS, ETC.  
 1916-1920  
 RELATING TO  
 THE COMMERCE AND SHIPPING OF THE  
 KINGDOM OF NORWAY, ETC.

*Published for the use of the legations and the consulates by order of the Royal Norwegian foreign office."*

The rule is well established that the printed collection of laws of a foreign country purporting to be published by the authority of that country is admissible without further proof as evidence of what those laws are.

*3 Wigmore, pp. 2157-2159;*

*Section 1900 of California Code of Civil Procedure.*

If the plaintiff desired to question the authenticity or correctness of the pamphlet it was its duty to do so at the time. If it had done so we could have removed any question in the matter. We could have shown, for example, that this particular pamphlet had been obtained from the Norwegian Consulate to which it had been furnished by the Norwegian government for the Consulate's guidance.

Plaintiff's counsel also contend that neither Mathiesen, nor the plaintiff, nor Smith intended to violate the laws of Norway. But the very letters to which counsel refer (Tr. pp. 59, 63-65) show that it was intended from the start to obtain a Norwegian register for the vessel and that she was registered in the name of Mathiesen for the sole reason that her true ownership

could not be shown and a Norwegian register obtained. A clearer instance of an attempt to evade the substantial requirements of a statute by an apparent compliance with them on the face of the record can hardly be imagined.

It would seem to follow beyond reasonable question that the unregistered trust by means of which such evasion was attempted was illegal. To our citation of authorities to that effect, counsel reply by quoting from *Lewin on Trusts*, to the effect that since the rendition of English cases cited by us the English law has been changed. This is true, but the change was not one in the law of trusts, but in the statute itself whereby that which had formerly been forbidden was no longer forbidden and the illegality was therefore removed. We submit that it is clear enough that if the trusts which were involved in the later English cases had been trusts created for the purpose of evading English statutes they would unquestionably have been held illegal.

Counsel would also seem to make the point that because the vessel happened to be here when the litigation was commenced the rights of the parties are not governed or affected by the Norwegian law and that this court should decree a transfer of the title to the vessel as the plaintiff asks, even though such transfer would be in violation of the Norwegian law. But it would seem to be wholly immaterial where the vessel happened to be when the litigation was commenced. The question is as to what law governs the rights of

the parties, and certainly that law does not vary as the vessel proceeds from port to port. We are not dealing here with the *res*, the vessel herself, but with the title to her, and since she is a Norwegian vessel it must be that questions as to her title and as to the transfer of her title are to be governed and determined by the Norwegian law.

There is a marked difference between such a case as the present and one involving rights arising not under the Norwegian law but under the law of the place where the vessel happens to be at the time. If, for example, supplies are furnished a vessel in some port where she happens to be, the right of the one supplying them depends upon and is governed by the law of that port and if by that law a lien is given for the value of the supplies the lien will exist and be enforced regardless of the law of the vessel's home port. But where, as here, the parties undertake to deal with the title of the vessel, their rights are governed by the law to which her title is subject. That law is the law of her home country and, in the present case, is the Norwegian law.

Dated, San Francisco,

November 1, 1921.

Respectfully submitted,

McCUTCHEM, OLNEY, WILLARD, MANNON & GREENE,  
McCLANAHAN & DERBY,

*Attorneys for Appellants.*

WARREN OLNEY, JR.,

*Of Counsel.*

No. 3758

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

11

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIE-  
SELSKAB (a corporation) and BJARNE ERIK-  
SEN (an individual),

*Appellants,*

VS.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY  
(a corporation),

*Appellee.*

FINAL BRIEF FOR APPELLEE.

LOUIS FERRARI,

BELL, SIMMONS & CREECH,

*Attorneys for Appellee.*

GOLDEN W. BELL,

*Of Counsel.*

FILED  
MAY 11 1911

U.S. DISTRICT COURT  
SACRAMENTO, CALIF.





No. 3758

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# United States Circuit Court of Appeals

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(a corporation),

*Appellee.*

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## FINAL BRIEF FOR APPELLEE.

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As defendants orally argued this case, and as plaintiff did not do so, and as defendants thereafter filed a reply brief, plaintiff desires to avail itself of the leave granted to it by this Court, and, in very few words, to comment upon several points advanced in such reply brief of defendants. It is respectfully submitted that all three conditions to the appointment of a receiver pendente lite as stated on page 3 of defendants' reply brief, are fulfilled by the record in the case at bar.

## APPELLANTS' REPLY BRIEF, PAGES 9 TO 12.

Defendants fail to take the case at bar out of the principles stated in the decision of this Court in *Sternfels v. Watson*, 139 Fed. 505, and they do not mention *Jones v. Williams*, 24 Beav. 47. They attempt to avoid the former case, by saying, first, that Mathiesen, without any request having been made by them of him, volunteered to them the representation that he held the vessel in trust for C. Henry Smith. There is no support in the record for this assumption. Defendants' only endeavor to give it substance is the following assertion:

“In the present case no more effective representation could have been made by the registered owner” (i. e. Mathiesen) “to the defendants that he held the registered title in trust for Smith than his recognition of Smith as the beneficial owner, a recognition plainly made to the defendants by *his taking and following the instructions of Smith to transfer the vessel to them as security for Smith's debts.*” (Appellant's Reply Brief, 10.)

There is not a syllable or a circumstance in the record to support the portion of this statement of appellants which we have italicized. It nowhere appears that Smith instructed Mathiesen to transfer the vessel to defendants “As security for Smith's debts”. It does not appear in any way that Mathiesen even knew that Smith was indebted to defendants. Nor does it appear that he knew for what purpose the vessel was transferred. Furthermore, it does not even appear that Mathiesen ever had any “recognition of Smith as the bene-

ficial owner". It must always be borne in mind that C. Henry Smith was the president and general manager of plaintiff corporation. It must also be remembered that in Smith's letter to attorney Barth, dated *October 23rd, 1920*, Smith informed Barth plainly that the plaintiff corporation "*is the actual owner of the boat*" (appellee's first brief, 5, 4); and that only *two days later* Smith wrote Mathiesen about the vessel, informing Mathiesen that he had written to Barth, and had asked Barth to get in touch with Mathiesen (appellee's first brief 6); and that on *April 21st, 1921, ante litem motam*, Mathiesen, as a matter of course, without question or evidence of surprise, sent to Smith the cable quoted in appellee's first brief, page 9.

It is pertinent to note, also, that the letter which defendants quote on pages 10 and 11 of their reply brief was not written until *June 24th, 1921*, which was long after the controversy over the vessel had arisen, and that the copy of the letter from which the quotation is made *was produced by defendants, having been handed to them by Mathiesen* (Tr. 76). It was, therefore, a document of the most self serving order, both as to Mathiesen himself and as to defendants. But, even in it, Mathiesen discloses that he knew Smith was not the owner:

"*How far Mr. Smith has gone beyond his power is unknown to me, and has nothing to do with me.*" (Appellants' Reply Brief, 11.)

Defendant's attempt to avoid the case of *Sternfels v. Watson* by saying, secondly, that if defend-

ants *had* made inquiry of Mathiesen it *would have* disclosed “merely that he knew no one but Smith in the matter and held the registered title, subject to his sole direction” (appellants’ reply brief, 10). But it is apparent from what has just been said, that Mathiesen did know plaintiff. Moreover, defendants in their opening brief, pages 6, 7, admit that the Court might reasonably conclude that there was a fair probability of establishing that *Mathiesen was trustee for plaintiff*. The only basis for defendants’ *speculation* as to what Mathiesen *would have* said concerning for whom he held the vessel, if defendants *had* made inquiry of him, is the above mentioned highly self serving letter of *June 24th, 1921*, written *post litem motam*. Obviously, this does not take defendants out of the rule that:

“the contingency that he (i.e. the trustee) might have denied the trust was no excuse for failure to make inquiry of him.”

*Sternfels v. Watson*, 507.

The language of Judge Sanborn in the case of *Geysen Marion Gold Min. Co. v. Stark*, 106 Fed. 558, which case is cited and quoted by this Court in *Sternfels v. Watson*, as noted in appellee’s first brief, and which quotes from *Jones v. Williams*, conclusively answers defendant’s contention:

“The old excuse for this dereliction that the word ‘trustee’ pointed to no one but the trustee himself of whom inquiry could have been made, and that such an inquiry would have been idle because he who would violate his trust would make false answer is again presented. Its

futility has been often shown, and perhaps nowhere better than by Sir John Romilly, master of the rolls, in *Jones v. Williams*, 24 Beav. 62, where he said:

*‘With respect to the argument that it was unnecessary to make any inquiry, because it must have led to no results, I think it impossible to admit the validity of this excuse. I concur in the doctrine of Jones v. Smith, 1 Hare, 55, that a false answer or a reasonable answer given to an inquiry made may dispense with the necessity of further inquiry; but I think it impossible beforehand to come to the conclusion that a false answer would have been given, which would have precluded the necessity of further inquiry. A more dangerous doctrine could not be laid down, nor one involving a more unsatisfactory inquiry, namely, a hypothetical inquiry as to what A. would have said if B. had said something other than what he did say.’*

*It is no excuse for the failure to make any inquiry that such investigation, if made, might have failed to develop the truth.”*

Had defendants in the case at bar inquired of Mathiesen for whom he was trustee of the “Pacifico”, he would have answered “For the California and Oriental Steamship Company”. Had defendants then said “What is Smith’s relation to that vessel?” he would have replied, “He is an officer or agent of that company”. And, regardless of whether in fact he would have so answered, the law will not hear defendant’s assertion that he would not have done so in the absence of inquiry of him on their part. It presumes that he would have done



so. The *very least* defendants were bound to do was to inquire of Mathiesen for whom he was trustee, and this they did not do.

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**APPELLANTS' REPLY BRIEF, Pages 12 to 16.**

Perhaps we did not make plain the most obvious answer to defendants' contention that before plaintiff can recover the vessel it must pay to defendants or Smith the alleged advance made by Smith toward the purchase price. It is this: even assuming that the allegations in Smith's affidavit are to be given credence, the record shows, and defendants admit, for the purpose of this appeal, at least, that it shows that *Mathiesen was trustee for plaintiff*. That being so, we fail to follow the argument that before plaintiff can enforce that trust it must pay Smith or anyone claiming under him whatever sum Smith may have advanced toward the purchase price. If plaintiff had had the title transferred to plaintiff itself, instead of to Mathiesen, can it be doubted that title would have been in plaintiff, and that Smith would have been simply a creditor of plaintiff for the portion of the purchase price which he may have advanced? It is always to be borne in mind that plaintiff, even on defendants' assumptions, advanced \$60,000. of the purchase price. Then, if Smith would have been only a creditor of plaintiff in the above case, how was he more than a creditor when the plaintiff, instead of having the title conveyed to itself, had it conveyed to Mathie-

sen *as trustee for plaintiff*? Why should not defendants, then, rather tender to plaintiff the portion of the purchase price which plaintiff paid, than demand that plaintiff tender to defendants the portion of the purchase price which they allege Smith furnished?

Plaintiff's other answers to this contention of defendants it is submitted are sound and are sufficiently set out in its first brief, pages 43 to 46. It may be remarked, however, in connection with the last paragraph on page 45 of appellee's first brief, and the last paragraph on page 15 of appellants' reply brief, that the record nowhere shows *when* plaintiff was to repay to Smith the money alleged to have been advanced by him, or that Smith ever made any demand for it, or expected that it would be, or was entitled to have it, paid at any time heretofore. And, of course, defendants stand only in Smith's shoes in this respect.

It is submitted that the other contentions appearing in appellants' reply brief have been answered in appellee's first brief and require no further consideration here.

Dated, San Francisco,  
November 14, 1921.

Respectfully submitted,

LOUIS FERRARI,  
BELL, SIMMONS & CREECH,  
*Attorneys for Appellee.*

GOLDEN W. BELL,  
*Of Counsel.*



No. 3758

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB  
(a corporation) and BJARNE ERIKSEN (an individual),

*Appellants,*

vs.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY  
(a corporation),

*Appellee.*

## APPELLANTS' PETITION FOR A REHEARING.

MCCUTCHEN, OLNEY, WILLARD, MANNON & GREENE,  
Merchants' Exchange Building, San Francisco,

MCCLANAHAN & DERBY,

Merchants' Exchange Building, San Francisco,

*Proctors for Appellants  
and Petitioners.*

WARREN OLNEY, JR.,

Merchants' Exchange Building, San Francisco,

*Of Counsel.*

**FILED**

FEB 15 1922

**F. D. MONCKTON,**

CLERK





No. 3758

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

NORSK HYDRO ELEKTRISK KVAELSTOF AKTIESELSKAB  
(a corporation) and BJARNE ERIKSEN (an indi-  
vidual),

*Appellants,*

vs.

CALIFORNIA & ORIENTAL STEAMSHIP COMPANY  
(a corporation),

*Appellee.*

## APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable William B. Gilbert, Presiding Judge,  
and the Associate Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit:*

The appellants herein respectfully petition for a re-hearing of the above cause upon the following ground:

That two vital questions determinative of the case, fully argued and briefed by counsel, were apparently overlooked by the court and have not been decided, namely:

1. That plaintiff is not entitled to recover without repaying or offering to repay the \$290,000 which C.

Henry Smith advanced from his own funds for the original purchase of the vessel (Appellants' Opening Brief, pp. 35-42; Reply Brief, pp. 12-16.)

2. That the trust which plaintiff is seeking to enforce is one illegal under the Norwegian law to which the vessel is subject, and the transfer which the plaintiff seeks to compel is prohibited by that law (Appellants' Opening Brief, pp. 42-50; Reply Brief, pp. 16-20).

*Both of these questions are decisive of the case. Neither of them was decided by this court.*

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### Argument.

Appellants, in their opening brief, after stating the facts and after endeavoring to show that the sole ground on which a receivership was asked was shown not to exist, made three main points for the reversal of the decision. The first was that the defendants were bona fide purchasers for value and without notice (Appellants' Opening Brief, pp. 26-34; Reply Brief, pp. 6-11). The other two points were the two points above referred to, which need not be repeated.

In stating the facts of the case, the court clearly recognized that these two last points were involved. We quote briefly from portions of the opinion (pp. 5-7):

“That Smith did purchase her from her then Japanese owners, as before stated, but instead of mortgaging the ship to obtain a portion of the purchase price, he actually paid the full purchase price with his own funds; that thereafter the same mentioned individuals, through the instrumentality

of the plaintiff corporation, paid Smith the \$60,000 which they had agreed to contribute toward the purchase price of the vessel, with the exception of which Smith has not been reimbursed to any extent and that the amount of \$290,000 paid by him on the purchase price still remains due; \* \* \* that by reason of the facts so alleged Smith had, in case the purchase was in reality for the account of the plaintiff, as alleged in the complaint, an equitable lien upon the vessel for the reimbursement to him of the amount of the purchase price which he had paid and for which he has not been reimbursed:

\* \* \* The answer also alleged that the plaintiff has never paid or offered to pay to either Smith or the defendant corporation any part of the purchase money of the vessel advanced by Smith, and it also set up as a separate defense that ever since July 21, 1916, the laws of Norway have made unlawful and prohibit the legal or beneficial ownership of any vessel registered under its laws to be held by one not a citizen of that country, or by a corporation not organized and existing under its laws, any violation of which is made punishable by fine and imprisonment and a forfeiture of the vessel; by reason of which it is alleged the defendants should not be compelled to transfer either the register or beneficial ownership of the vessel to the plaintiff."

The reasoning part of the opinion of the court (pp. 8-13), down to the last paragraph thereof (p. 13), apart from the brief statement that there was no abuse of discretion by the lower court (p. 8), deals solely with *further facts* in the case. It then concludes as follows:

"The records above referred to, if genuine, very clearly show that Mathiesen held the title to the ship in trust for the plaintiff corporation; and as the defendants, according to their own pleading, knew that he held in trust for somebody, it cannot

be supposed that they would not have ascertained the truth by making inquiry of the trustee, which it does not appear that they did or tried to do. See our own decision in *Sternfels v. Watson*, 139 Fed. 505; *Geyser Marion Gold Min. Co. v. Stark*, 106 Fed. 558; *Jones v. Williams*, 24 Beav. 62.

The order is affirmed."

The above quotation is the *only* ruling on the law points argued by counsel and involved in the case. It disposes, and purports to dispose only, of the contention that upon the facts, so far as they appeared, defendants were bona fide purchasers for value without notice. The other two points were, however, equally important and *far more conclusive* of the case and they were (inadvertently, we feel sure) *ignored* by the court. It is well settled that "*a rehearing will be granted if the court has overlooked material points or decisive authorities duly submitted by counsel*" (4 *Corpus Juris*, 632, and numerous cases there cited). There can be no question but that this requirement is fulfilled in the case at bar. Either of the two points overlooked by the court, if decided in favor of appellants, would necessitate a reversal of the order appealed from irrespective of the ruling on the point which the court *did* purport to decide.

We will now briefly recur to the two points not passed on by the court.

## I.

**THE PLAINTIFF IS NOT ENTITLED TO RECOVER WITHOUT REPAYING OR OFFERING TO REPAY THE \$290,000 WHICH C. HENRY SMITH ADVANCED FROM HIS OWN FUNDS FOR THE ORIGINAL PURCHASE OF THE VESSEL.**

It would be futile to reargue a matter which has already been so fully argued (Appellants' Opening Brief, pp. 35-42; Reply Brief, pp. 12-16). The *facts* in regard to the contention were, as already shown, stated by the court, but, in deciding the case, it failed to advert to those facts.

Briefly the situation is that C. Henry Smith bought the vessel for \$350,000, *advancing his own funds for that purpose*; that he has only been reimbursed to the extent of \$60,000, leaving \$290,000 still due and owing; that defendants stand at least in the shoes of Smith and that plaintiff cannot recover without repaying or offering to repay the last named sum, which it has not done. Numerous decisive authorities were cited in support of this conclusion, and it is not one which in our judgment is open to doubt.

We do not argue this point over again. We simply state it, for we believe that the mere statement of it is sufficient to show that it is at least worthy of consideration and determination.



## II.

THE TRUST WHICH THE PLAINTIFF IS SEEKING TO ENFORCE IS ONE ILLEGAL UNDER THE NORWEGIAN LAW TO WHICH THE VESSEL IS SUBJECT, AND THE TRANSFER WHICH THE PLAINTIFF SEEKS TO COMPEL IS PROHIBITED BY THAT LAW.

This point also was fully presented (Appellants' Opening Brief, pp. 42-50; Reply Brief, pp. 16-20), and it has not been decided. The Norwegian law on this subject is before the court in pamphlet form and was inserted in full in our briefs. *It plainly prohibits any trust in favor of an American corporation in regard to a Norwegian vessel.* No adequate reply was made by plaintiff to our argument on this point. Hence plaintiff's case wholly fails.

*We unhesitatingly state that, in our opinion, the above point is conclusive of the case.* Yet it has not been decided and was not even noticed except by a brief reference to it in the statement of facts. Here again it would be undignified to reargue the question at this time.

---

CONCLUSION.

The above two points are decisive of the case. They must be decided *some* time in the litigation and ought to be decided now, as, if they are well taken, the order appointing a receiver was erroneous. If, on the other hand, they are not decided now, the defendants will be placed at a grave disadvantage in subsequently relying on them. This is self-evident.

We submit that fair play to our Norwegian clients and to us should lead to a rehearing of this case. Otherwise our efforts in the case have gone for naught and we are placed in the unfortunate position of having failed to obtain a decision on vital matters connected with this litigation—matters which, we respectfully submit, are decisive of the case and *should* have been considered, in justice both to our clients and to us.

Dated, San Francisco,  
February 14, 1922.

Respectfully submitted,

McCutchen, Olney, Willard, Mannon & Greene,  
McClanahan & Derby,

*Proctors for Appellants  
and Petitioners.*

WARREN OLNEY, JR.,  
*Of Counsel.*

---

#### CERTIFICATE OF COUNSEL.

We, Warren Olney, Jr., and S. Hasket Derby, hereby certify that we are of counsel for the appellants and petitioners in the above entitled cause, and that in our judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco,  
February 14, 1922.

WARREN OLNEY, JR.,  
S. HASKET DERBY,  
*Of Counsel for Appellants  
and Petitioners.*



IN THE  
United States Circuit Court of Appeals  
For the Ninth Circuit

J. L. NIDAY, and MOLLIE GREEN  
NIDAY, GEORGE A. BUELL and  
EFFIE ADA BUELL, and A. L.  
GREEN,

*Appellants,*

vs.

JULIA GREEN GRAEF,  
*Appellee and Cross Appellant.*

Transcript of the Record

FILED

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F. D. MONCKTON,  
CLERK

*Upon Appeal from the United States District Court  
for the District of Idaho, Southern Division.*





IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

J. L. NIDAY, and MOLLIE GREEN  
NIDAY, GEORGE A. BUELL and  
EFFIE ADA BUELL, and A. L.  
GREEN,

*Appellants,*

vs.

JULIA GREEN GRAEF,  
*Appellee and Cross Appellant.*

---

**Transcript of the Record**

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*Upon Appeal from the United States District Court  
for the District of Idaho, Southern Division.*



NAMES AND ADDRESSES OF ATTOR-  
NEYS OF RECORD:

---

ALFRED A. FRASER,  
Boise, Idaho.

*Attorney for Appellant.*

PLATT & PLATT, MONTGOMERY & FALES,  
619 Platt Building, Portland, Oregon.

*Attorneys for Appellees.*



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*Upon Appeal from the United States District Court  
for the District of Idaho, Southern Division.*

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No. 759.

BILL OF COMPLAINT IN EQUITY.

JULIA GREEN GRAEF,

*Plaintiff.*

vs.

J. L. NIDAY, and MOLLIE GREEN  
NIDAY, GEORGE A. BUELL and  
EFFIE ADA BUELL, and A. L.  
GREEN,

*Defendants.*

---

COMES NOW the plaintiff above named, and  
for cause of suit against the defendants above  
named complains and alleges as follows:

1.

That during all the times mentioned in this bill  
of complaint the plaintiff was and still is a citizen,  
resident and inhabitant of the State of Oregon, re-  
siding in the City of Portland, Multnomah County,  
State of Oregon.

II.

That during all the times mentioned in this bill  
of complaint the defendants above named, and each  
of them, were and now are citizens, residents and

inhabitants of the State of Idaho, and the defendants, J. L. Niday and Mollie Green Niday, his wife, reside in the City of Boise in said State of Idaho.

### III.

That during all the times mentioned in this bill of complaint the defendants J. L. Niday and Mollie Green Niday were and still are husband and wife.

### IV.

That during all the times mentioned in this bill of complaint the defendants George A. Buell and Effie Ada Buell were and still are husband and wife.

### V.

That on the 16th day of March, 1917, one R. E. Green died in the City of Boise, State of Idaho, leaving as his lineal descendants Julia Green Graef, the plaintiff above named, Gracia Green Acuff, and Mollie Green Niday, being the only daughters of said R. E. Green, and Philo F. Green, George L. Green and J. M. Green, being the only sons of said R. E. Green, who was eighty-one years of age at the time of his death.

### VI.

That the said Julia Green Graef, Gratia Green Acuff, Mollie Green Niday, Philo F. Green, George L. Green and J. M. Green are the sole heirs at law of said R. E. Green, deceased.

### VII.

That during the latter part of his lifetime the said R. E. Green resided in Canyon County, State

of Idaho, and for a few years prior to his death was the owner of and in possession of a large amount of real property situated in said Canyon County, State of Idaho, and more particularly the real property hereinafter described and commonly known as "Greenhurst," which was the home and place of residence of the said R. E. Green and his family.

### VIII.

That on and prior to the 22nd day of December, 1914, the said R. E. Green was the owner and in possession of the following described property:

- (a) That part of the northeast quarter of the northwest quarter of Section 6, Township 2 North, Range 1 W. B. M. lying north and east of the right of way of the Oregon Short Line Railway Company, containing 6 acres of land, more or less, situated in Canyon County, State of Idaho;

Together with ditches and ditch rights and a water right consisting of 4 miners' inches of the waters of what is commonly called "The Ridenbaugh Canal" owned by the Nampa and Meridian Irrigation District, under the rules and regulations thereof;

and on and prior to the 1st day of October, 1915, the said R. E. Green was the owner and in possession of the following described property:

- (b) The southeast quarter of the northwest quarter and Lots 2 and 3, and all that part of Lot 4 lying north and east of the right of way of the Oregon Short Line Railway Company, and the east half of the southwest quarter, except 3 acres heretofore deeded to the Nampa and Meridian Irrigation District, all in Section

31, Township 3 North, Range 1 W. B. M., containing 206 acres, more or less; together with the water rights, ditches and ditch rights thereunto belonging or in anywise appertaining; being all situated in the County of Canyon and State of Idaho.

IX.

That on and immediately prior to the 1st day of October, 1915, that portion of the above described real property located on said Section 31 was worth, and of the reasonable value, of \$30,000.00, subject to the lien of two mortgages—one in the sum of \$10,000.00, and the other in the sum of \$1,683.85; the first mortgage being recorded in Book 48, page 81 and the second in Book 59, page 89 of the mortgage records of Canyon County, Idaho.

X.

That the defendant J. L. Niday was during all the times mentioned in this bill of complaint the son-in-law of the said R. E. Green, and was an attorney-at-law, duly licensed to practice in the State of Idaho.

XI.

That for some time prior to the 22nd day of December, 1914, the said J. L. Niday, son-in-law of the said R. E. Green, acted as the attorney, counsellor, legal advisor and confidential adviser of the said R. E. Green, and such confidential relation continued continuously up until the time of the death of said R. E. Green.

## XII.

That the said R. E. Green died intestate, and his personal property has been administered upon, and nothing remained of value for the plaintiff or his other heirs, except the defendant Mollie Green Niday.

## XIII.

That the said R. E. Green was a man of industrious habits and strong character, and was of a congenial and amiable temperament, having strong domestic attachments, and was especially fond of his wife and children; that his attachment for his wife was of an exceptionally strong nature, and his wife was a woman of great activity and sound business judgment, and she greatly aided the said R. E. Green in the management of his affairs.

## XIV.

That in the month of September, 1909, the wife of the said R. E. Green, while in a state of good health, was accidentally injured, and died within five days from the effects of such injury, and the sudden death of his wife greatly shocked and injured the said R. E. Green, causing his nerves and mental faculties to weaken, which condition continued until the time of his death, and became greatly aggravated during the latter part of the year 1914 and the years 1915 and 1916.

## XV.

That the weak mental condition of the said R. E. Green made him extremely susceptible to the in-



fluences and suggestions of those who were in close and confidential relations with him, and made him especially susceptible to the influence and suggestions of the said J. L. Niday, who was his son-in-law, legal advisor and confidential advisor, and to the influence and suggestions of his daughter Mollie Green Niday, the wife of the said J. L. Niday, and for a considerable period of time prior to the 22nd day of December, 1914, the said R. E. Green was in such a mental condition that his mind was not a safe guide for his actions, and such condition was continuous and became gradually worse until the time of his death.

## XVI.

That the defendants J. L. Niday and Mollie Green Niday, his wife, well knew the mental condition of the said R. E. Green during the years 1914, 1915 and 1916, and entered into a conspiracy to cheat and defraud the said R. E. Green out of his property, and to cheat and defraud the heirs of the said R. E. Green out of their legal interests in his property, and in furtherance of such conspiracy did in November, 1914, take over the management of the affairs of the said R. E. Green, knowing that he was incapable at that time of managing his own affairs, and caused the said R. E. Green to be removed against his wishes from Nampa, Idaho, to a house in Boise, Idaho, belong-

ing to the said J. L. Niday, and further caused the said R. E. Green to remain in said house until the time of his death.

## XVII.

That further carrying out said conspiracy to cheat and defraud the said R. E. Green out of his property, the said J. L. Niday and Mollie Green Niday, his wife, acting secretly and clandestinely, caused the said R. E. Green to execute and deliver to the said J. L. Niday, his son-in-law and legal advisor, a warranty deed to the real property designated as "a" and described on page 3 of this bill of complaint, which deed was dated December 22nd, 1914, about one month after the said J. L. Niday and Mollie Green Niday, his wife, had caused the said R. E. Green to be brought against his will to Boise, Idaho, and placed in the house of the said J. L. Niday, which deed was not placed on the public record until February 19th, 1916, and the facts and circumstances surrounding the procurement, execution and delivery of said deed are not fully known to this plaintiff, or to any of the lineal descendants of the said R. E. Green, except possibly to the defendant Mollie Green Niday, for the reason that none of said lineal descendants knew of the execution and delivery of said deed until after the death of the said R. E. Green, except the defendant Mollie Green Niday.

## XVIII.

That further carrying out said conspiracy to cheat and defraud the said R. E. Green out of his property, the said J. L. Niday and Mollie Green Niday, his wife, acting secretly and clandestinely, caused the said R. E. Green to execute and deliver to the said J. L. Niday, his son-in-law and legal advisor, a warranty deed to the real property designated as "b" and described on page 3 of this complaint, which deed was dated October 1st, 1915, about one year after the said J. L. Niday and Mollie Green Niday, his wife, had caused the said R. E. Green to be brought to Boise, Idaho, against his will and placed in the house of the said J. L. Niday, which deed was not placed on the public record until May 27th, 1916, and the facts and circumstances surrounding the procurement, execution and delivery of said deed are not fully known to this plaintiff, or to any of the lineal descendants of the said R. E. Green, except possibly the defendant Mollie Green Niday, for the reason that none of said lineal descendants knew of the execution and delivery of said deed until after the death of the said R. E. Green, except the defendant Mollie Green Niday.

## XIX.

That at the time when each of said deeds was procured from the said R. E. Green, the said R. E. Green was in such a condition, mentally and physically, that his mind was not a safe guide for his actions, and he was not capable of transacting bus-

iness, and was directly subject to the influence and suggestions of his legal and confidential advisor, the said J. L. Niday, and his wife, and plaintiff alleges that said deeds were procured by the said J. L. Niday through the exercise of undue influence over the weakened mind of the said R. E. Green, and such fraud was not known to plaintiff until more than a year after the death of the said R. E. Green.

## XX.

That at the time of the execution and delivery of each of said deeds, the real property covered thereby was of the actual and reasonable value of more than Thirty Thousand (\$30,000.00) Dollars, subject to mortgage liens aggregating Eleven Thousand Six Hundred Eighty-three (\$11,683.85) Dollars and eighty-five cents, and the said J. L. Niday did not pay to the said R. E. Green any valuable or adequate consideration for the real property described in said deeds, which constituted all the real property then or thereafter owned by the said R. E. Green.

## XXI.

That at the time and times when each of said deeds were purported to be executed by the said R. E. Green, the said R. E. Green was not competent to execute the same, and did not have full knowledge of the contents and effect thereof, and the plaintiff is informed and believes and therefore alleges the fact to be, that the said R. E. Green re-



ceived no independent advice concerning the contents and effect of said deeds independently of the advice and suggestions of the grantee therein named, who was the defendant J. L. Niday, the son-in-law and legal and confidential advisor of the said R. E. Green.

## XXII.

That since the procurement of said deeds, the said defendants J. L. Niday and Mollie Green Niday have appropriated to their own use the entire proceeds and profits of said real property, and have not accounted for the same to the plaintiff.

## XXIII.

That the plaintiff is informed and believes, and, therefore, alleges the fact to be that the defendants J. L. Niday and Mollie Green Niday have attempted to convey the property described in said deeds to the defendants George A. Buell and Effie Ada Buell and A. L. Green, and that said defendants and each of them received said conveyance with full knowledge of the outstanding claim of the plaintiff, and had knowledge of facts sufficient to put them on inquiry, and that said conveyance was attempted to be made by the said J. L. Niday for the sum of Thirty Thousand (\$30,000.00) Dollars.

## XXIV.

That Gratia Green Acuff and Philo F. Green, the said children of the said R. E. Green, have sold, assigned and transferred to the plaintiff for a valuable consideration all their right, title and interest



in and to the real property described in paragraph VIII of this bill of complaint, and the plaintiff is the bonafide owner and holder of said claims for value.

#### XXV.

That George L. Green and J. M. Green have settled with the defendant J. L. Niday their claims against the estate of R. E. Green, and have transferred unto the said J. L. Niday all their right, title and interest in and to the real property described in paragraph VIII of this bill of complaint.

#### XXVI.

That plaintiff has demanded from the defendants J. L. Niday and Mollie Green Niday an accounting and settlement of the rents, issues and profits of said real property, or in case of a sale thereof, of the proceeds arising therefrom, and such demand has been refused.

#### XXVII.

That this is a suit between citizens of different states, and the amount in controversy exceeds the sum of Three Thousaid (\$3,000.00) Dollars, exclusive of interests and costs.

#### XXVIII.

That plaintiff herein has no plain, adequate or speedy remedy at law, but only in equity.

WHEREFORE, plaintiff prays:—

*First.* For a decree of this Court declaring null and void the deeds of conveyance from the said R. E. Green to the said J. L. Niday, and directing that

the said J. L. Niday and Mollie Green Niday, his wife, execute and deliver to the plaintiff a deed of conveyance to said real property within thirty days from the date of the decree of this Court, and in event of the failure of said defendants to make such deed, that the decree of this Court stand in lieu thereof.

*Second.* For a decree of this Court declaring null and void the purported deed of conveyance from the defendants J. L. Niday and Mollie Green Niday to the defendants George A. Buell, Effie Ada Buell and A. L. Green, or for a decree declaring that the said last named defendants hold said real property in trust for the plaintiff, and directing the said defendants deliver to the plaintiff, within thirty days from the date of the decree of this Court, a deed to said real property, and in the event of their failure so to do, that the decree of this Court stand in lieu thereof.

*Third.* For a decree of this Court directing that the defendants J. L. Niday and Mollie Green Niday render unto the plaintiff an accounting of all profits and proceeds arising from the use of said real property, or in the event that the Court finds that a bonafide sale of said real property has been made, that defendants J. L. Niday and Mollie Green Niday account to the plaintiff for all the proceeds arising from such sale, and deliver to the plaintiff any securities received on the purchase price of said property.

*Fourth.* That the defendants and each of them be enjoined from making any disposition of said real property during the pendency of this suit.

*Fifth.* That plaintiff have and recover of and from the defendants her costs and disbursements herein incurred.

*Sixth.* That plaintiff have such other and further relief as the Court may deem equitable and proper.

*Seventh.* That the Court grant unto the plaintiff an order directing the issuance of a subpoena to each and all of the defendants commanding them and each of them to appear before this Court on a day certain to be named to answer the allegations of this complaint under penalty therein named.

HUGH MONTGOMERY,

PLATT & PLATT,

*Solicitors for Plaintiff.*

(Duly Verified)

Endorsed: Filed March 23, 1920.

W. D. McREYNOLDS, Clerk.

---

*In the District Court of the United States in and for  
the District of Idaho, Southern Division.*

---

JULIA GREEN GRAEF,

*Plaintiff,*

vs.

GEORGE A BUELL and EFFIE  
ADA BUELL, his wife, and A. L.  
GREEN, et al.

*Defendants.*

---

No. 759.  
ANSWER.

COMES NOW the defendants George A. Buell and Effie Ada Buell, his wife, and A. L. Green and for answer to the plaintiff's complaint admits, denies and alleges:

I.

The defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the plaintiff's bill of complaint.

II.

These defendants have no knowledge, information or belief upon the subject sufficient to enable them or either of them to answer the allegations contained in paragraph nine of the bill of complaint and therefore deny said allegations.

III.

These defendants admit the allegations contained in paragraph 10 of the plaintiff's bill of complaint.

IV.

These defendants have no knowledge, information or belief upon the subject sufficient to enable them or either of them to answer the allegations contained in paragraphs 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of the plaintiff's bill of complaint and therefore deny each and all of said allegations.

V.

These defendants deny that they received the conveyance mentioned in paragraph 23 of the plain-

tiff's bill of complaint with full knowledge or of any knowledge for the outstanding claim of the plaintiff or that they or either of them had knowledge of any fact or facts sufficient to put them on inquiry.

## VI.

These defendants or either of them have not sufficient knowledge, information or belief upon the subject sufficient to enable them or either of them to answer the allegations contained in paragraphs twenty-four and twenty-five and twenty-six of plaintiff's bill of complaint and therefore denies said allegations.

## VII.

These defendants further answering the said complaint and by way of cross-complaint allege:

1. That during the year 1918 these answering defendants purchased of J. L. Niday and Mollie Green Niday the following described real property, to-wit:

The Southwest Quarter (SW $\frac{1}{4}$ ) of the North west Quarter (NW $\frac{1}{4}$ ) and Lots Two (2) and Three (3) and that part of Lot Four (4) lying north of the right of way of the Oregon Short Line Railway Company, and the East Half (E $\frac{1}{2}$ ) of the Southwest Quarter (SW $\frac{1}{4}$ ) except about three acres theretofore deeded to the Nampa and Meridian Irrigation District, all in Section Thirty-one (31), in Township Three (3), North Range One (1), West of the Boise Meridian, containing about two hundred six (206) acres in Canyon County, Idaho, and paid to said J. L. Niday and Mollie Green



Niday the full purchase price therefor and that at the time of said purchase, and payment of the consideration therefor, they had no knowledge or any notice of any claim or demand of the said plaintiff's or either of them against the said property or that said plaintiff or either of them claimed any right title, or interest in or to the said property.

2. That these defendants now owners of the above described real property are in possession of the same; that the plaintiffs Julia Green Graef, and Gratia Green Acuff and Phil F. Green, claim some right, title or interest in or to said property or some portion thereof, but that said right, title or interest of said plaintiffs and each of them is subordinate and inferior to the right, title and interest of these defendants.

WHEREFORE, These defendants pray judgment of the Court quieting their said title against all claim and demands whatsoever of these plaintiffs, and that these defendants may recover their costs herein.

ALFRED A. FRASER,

*Attorney for Defendants, George  
A. Buell, Effie Ada Buell, and  
A. L. Green, Residing at Boise  
City, Idaho.*

STATE OF IDAHO            )  
                                      ) ss.  
COUNTY OF ADA.         )

Alfred A. Fraser being first duly sworn deposes and says that he is the attorney for the defendants in the above entitled action and that he has read the

foregoing answer and knows the contents thereof, and that he believes the same to be true. The reason this verification is made by the attorney is that the defendants and each of them are non-residents and absent from Ada County, Idaho, the County in which the said attorney resides.

ALFRED A. FRASER.

(Seal)

Subscribed and sworn to before me this 13th day of April, 1920.

C. A. CARTER,

*Notary Public, in and for  
the State of Idaho.*

Filed Apr. 13th, 1920.

W. D. McREYNOLDS, Clerk.

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*In the District Court of the United States in and for  
the District of Idaho, Southern Division.*

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JULIA GREEN GRAEF,

*Plaintiff,*

vs.

J. L. NIDAY and MOLLIE GREEN  
NIDAY, his wife, GEORGE A.  
BUELL and EFFIE ADA BUELL,  
his wife, and A. L. GREEN,

*Defendants.*

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No. 759.

ANSWER.

Comes now the defendants J. L. Niday and Mollie Green Niday, his wife, and for answer to the bill of complaint herein admits, denies and alleges:

## I.

The defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the plaintiff's bill of complaint.

## II.

These defendants deny that immediately prior to the first day of October, 1915, or on said date, that portion of the above described real property located in section thirty-one (31) was worth or of the reasonable value of thirty thousand (\$30,000.00) dollars or of any other value greater than the sum of fifteen thousand (\$15,000.00) dollars.

## III.

These defendants admit the allegations contained in paragraph ten of plaintiff's bill of complaint.

## IV.

These defendants deny that for some time prior to the 22nd day of December, 1914, the said J. L. Niday acted as attorney, counselor, legal advisor, or confidential advisor of the said R. E. Green and denies that such confidential relation continued continuously up until the time of the death of the said R. E. Green, but defendants allege that the said R. E. Green in his life time counseled said J. L. Niday, as an attorney at law in regard to certain specific legal matters, but that on the 22nd day of December, 1914, or on the 1st day of October, 1915, the relationship of attorney and client did not exist between said R. E. Green and said J. L. Niday and that there was then pending no unfinished legal

business in which the said J. L. Niday was acting as attorney or counsellor for said R. E. Green.

V.

Defendants admit the allegations contained in paragraph twelve of plaintiff's bill of complaint but deny that the said defendant Mollie Green Niday received any greater portion of the personal property of the estate of R. E. Green than any other of his heirs.

VI.

These defendants deny the allegations contained in paragraph thirteen of the bill of complaint that the wife of said R. E. Green "was a woman of sound business judgment."

VII.

These defendants answering the allegations contained in paragraph fourteen of the bill of complaint admit that the said R. E. Green was greatly shocked at the sudden death of his wife but deny that her death caused his nerves or mental faculties to weaken and denies that this condition continued until the time of his death or at all.

VIII.

These defendants deny that the said R. E. Green was extremely or at all susceptible to the influences or suggestions of those who were in close and confidential relations with him and denies that he was susceptible to the influences or suggestions of said J. L. Niday and deny that the said J. L. Niday was his legal or confidential advisor and deny that

said R. E. Green was susceptible to the influences or suggestions of the defendant Mollie Green Niday, and these defendants deny that for a period of time prior to to the 22nd day of December, 1914, or at any time prior thereto the said R. E. Green was in such a mental condition that his mind was not a safe guide for his actions and deny that such condition was continuous or that the same became gradually worse until the time of his death.

#### IX.

The defendants deny that said J. L. Niday and Mollie Green Niday, his wife, during the years 1914, 1915 and 1916 or at any other time or at all entered into a conspiracy to cheat or defraud the said R. E. Green out of his property or to cheat or defraud the heirs of the said R. E. Green out of their legal interests in his property and deny that in furtherance of such conspiracy they or either of them did in November, 1914, or at any other time take over the management of the affairs of the said R. E. Green and defendants deny that they caused the said R. E. Green to be removed against his wishes or caused him at all to be removed from Nampa, Idaho, to a house in Boise belonging to the said J. L. Niday, and deny that they caused the said R. E. Green to remain in said house until the time of his death.

#### X.

These defendants deny that for the further carrying out of said conspiracy to cheat or defraud the



said R. E. Green out of his property or for any other purpose the said J. L. Niday and Mollie Green Niday, caused the said R. E. Green to execute and deliver to said J. L. Niday a Warranty Deed to the real property designated as "A" and described on page three of the bill of complaint, and these defendants deny that they or either of them caused the said R. E. Green to be brought against his will to Boise or placed in the house of said J. L. Niday and these defendants deny that none of the lineal descendants knew of the execution and delivery of this deed until after the death of the said R. E. Green, except the defendant Mollie Green Niday.

## XI.

These defendants deny that for the further carrying out said conspiracy to cheat and defraud the said R. E. Green out of his property or for any other reason at all the said J. L. Niday and Mollie Green Niday acting secretly or clandestinely or at all caused the said R. E. Green to execute or deliver to said J. L. Niday a Warranty Deed to the real property designated as "B" and described on page three of the bill of complaint and these defendants have no knowledge, information or belief upon the subject sufficient to enable them to answer the allegations in paragraph eighteen of the plaintiff's bill of complaint to the effect "that the facts and circumstances surrounding the procurement, execution and delivery of said deed are not fully known

to this plaintiff," and therefore deny said allegations.

## XII.

These defendants deny that at the time when each of said deeds were made, executed and delivered that the said R. E. Green was in such a condition mentally and physically that his mind was not a safe guide for his actions and deny that he was not capable of transacting business and deny that he was directly or at all subject to the influence of said J. L. Niday, and deny that said J. L. Niday was at such time his legal or confidential advisor and deny that he was at all subject to the influence and suggestions of the defendant Mollie Green Niday, and defendants deny that said deeds or either of them was procured by the said J. L. Niday through the exercise undue or any influence over the mind of said R. E. Green, and denies that the mind of said R. E. Green was at all weakened at said time.

## XIII.

The defendants deny that at the time of the execution and delivery of the deeds mentioned in the bill of complaint the real property covered thereby was of the actual and reasonable value of more than thirty thousand (\$30,000.00) dollars or of any value whatsoever in excess of fifteen thousand (\$15,000.00) dollars and these defendants deny that said J. L. Niday did not pay to said R. E. Green

any valuable or adequate consideration for the real property described in said deeds.

#### XIV.

These defendants deny that at the time and times when each of said deeds were executed by the said R. E. Green was not competent to execute the same and deny that he did not have full knowledge of the contents and effect thereof, and these defendants have no knowledge, information or belief upon the subject sufficient to enable them to answer as to whether or not the said R. E. Green received no independent advice concerning the contents and effect of said deeds therefore denies the same and denies that said R. E. Green at the time of the execution and delivery of said deeds or at any other time said R. E. Green received any advice or suggestions in regard to the same from the said J. L. Niday.

#### XV.

These defendants have no knowledge, information or belief upon the subject sufficient to enable them to answer the allegations contained in paragraph twenty-three of the bill of complaint to the effect that the defendants George A. Buell, Effie Ada Buell and A. L. Green received the conveyance of said property with knowledge of the claim of the plaintiff or had knowledge of any facts sufficient to put them on inquiry and therefore denies said allegations.

## XVI.

These defendants have no knowledge, information or belief upon the subject sufficient to enable them to answer the allegations contained in paragraph twenty-four of the bill of complaint to the effect that Gratia Green Acuff and Philo F. Green have sold, assigned and transferred to the plaintiff for a valuable consideration of their rights, title and interest in and to the real property described in paragraph eight of the bill of complaint and that the plaintiff is the bonafide owner and holder of the said claims for value and therefore denies said allegations.

## XVII.

These defendants deny that said George L. Green and J. M. Green have settled with defendant J. L. Niday any claims against the estate of R. E. Green and these defendants deny that said George L. Green and J. M. Green ever had any valid, legal or lawful claim against the said estate.

## XVIII.

WHEREFORE, These defendants pray that the action may be dismissed, that the plaintiff take nothing by her complaint and the defendants recover their costs and for such other and further relief as may be just and equitable.

ALFRED A. FRASER,

*Attorney for Defendants, J. L.  
Niday and Mollie Green  
Niday, Residing at Boise City,  
Idaho.*

STATE OF IDAHO,                 )  
COUNTY OF ADA.               ) ss.

J. L. Niday being first duly sworn upon his oath deposes and says that he is one of the defendants in the above entitled action, that he has read the foregoing answer and knows the contents thereof; and that he believes the facts therein stated to be true.

J. L. NIDAY,

(Seal)

Subscribed and sworn to before me this 13th day  
of April, 1920.

C. A. CARTER.

*Notary Public, in and for  
the State of Idaho.*

Filed Apr. 13, 1920.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

### DECISION.

Oct. 23, 1920.

Platt & Platt, Hugh Montgomery,

*Attorneys for Plaintiff.*

Alfred A. Fraser,

*Attorney for Defendants.*

DIETRICH, DISTRICT JUDGE.

The defendant J. L. Niday, who will be referred to as the defendant, holds the title to two hundred and twelve acres of farm land in Canyon County,



Idaho, which the plaintiff contends rightfully belongs to the heirs of R. E. Green, deceased. The only heirs of the deceased are his six children, two of whom are the plaintiff and the defendant's wife. The defendant is an attorney at law. Green was a civil engineer, and came to Idaho in 1890, to take charge of a canal system and certain lands irrigated thereby, for eastern investors. He himself acquired several tracts lying under the system, aggregating five or six hundred acres, upon one of which, the two hundred and twelve acres in controversy, he established his home, referred to in the record as Greenhurst. Upon it he constructed a large but not very substantial house of twelve rooms, and outbuildings for storing grain, sheltering livestock, and for other purposes. For several years—until it was sold—he had the management of the canal system, and thereafter he continued in charge of certain of the lands still belonging to the eastern investors or their estates. To his professional training and general culture he added a taste for literature and the fine arts. In the matter of business he appears to have had a capacity for administration and office details, but apparently he did not possess in a high degree the qualities requisite to success in independent enterprising. In 1909 his wife, who had assumed the leadership insofar as concerned his own business affairs, suddenly died as the result of an accident. Grief-stricken and under the necessity of taking the ini-

tiative without the assistance of his wife, he became deeply involved in debt. By 1914 so apparent had it become that he could not make a success of his affairs that the defendant and some of his children induced him to come to Boise to live. He was then seventy-eight years of age. A small home was rented for him, and he, together with his mother-in-law, was cared for by his deceased wife's sister. The defendant and his wife also lived at Boise. Two of the other children lived near by most of the time, and the others at more distant points.

For more than twenty years prior to 1914 the deceased had been on very intimate terms with the defendant, not only by reason of family ties, but through professional relations and friendly association. To him rather than to his own sons he looked for counsel and guidance when he fell into financial distress. When he came or was brought to Boise from the farm he owed debts exceeding in the aggregate forty thousand dollars. With the assistance of the defendant he negotiated terms of settlement with certain mortgage creditors, by which they satisfied all outstanding unsecured claims, as well as their mortgages, in consideration of deeds to the mortgaged property. With the largest creditor, holding claims for about eighteen thousand dollars, this settlement was made upon the further consideration that the deceased should have the right to repurchase the property within a stated period for the face value of the claim. The upshot

of these settlements was that the deceased was left with the option to repurchase, as already explained, and the two hundred and twelve acres in controversy, two hundred and six acres of which was subject to two mortgages aggregating between eleven and twelve thousand dollars. Upon completing the settlement he at once (on December 22, 1914) executed a deed to defendant for six acres, the only unincumbered property he had, the deed reciting a consideration of one dollar. The instrument was withheld from record until February 19, 1916. On October 1, 1915, he executed another deed to defendant, reciting a consideration of one dollar and other valuable considerations, covering the other two hundred and six acres, subject to the mortgages, which the defendant assumed and agreed to pay. This deed was withheld from the records until May 27, 1916. In the meantime, in the early part of 1916, Green had a severe attack of pneumonia, from the effects of which, both physical and mental, he did not fully recover, and he died in March, 1917.

The witnesses are widely at variance touching Green's mental condition when the two deeds were executed. Upon certain occasions he acted strangely, but not in such a manner or to such an extent as to warrant a finding of total incompetency. That certain of his faculties were much impaired cannot be doubted. To use a common phrase, it was an extreme case of second childhood. It may very well be that the more or less common tendency to

such mental reversion in the aged was hastened and accentuated not only by the shock of his bereavement, but by the consciousness of business defeat, with the attendant feeling of humiliation and loss of confidence in himself. However that may be, it is plain that when he came or was brought from Greenhurst to Boise his family entertained the view that he was in need of a measure of the care and protection appropriate to a child. That he continued to gratify his taste for reading and was able to discuss, and at times manifested an interest in, the fine arts, is not highly material. Such capacity the immature may have, and yet be quite incompetent touching their property rights and financial interests. Nor does his conduct in making adjustment with his creditors necessarily imply mental vigor. He was there treating with strangers, with the zealous and able assistance of the defendant. It was quite another thing for him unaided to deal with a member of his own family or a close personal friend in whose judgment and fair intent he had implicit confidence. Against such a one he would have neither the capacity to be wary nor the strength of will to make resistance. In view of his mental condition and the relation of confidence which had long existed between him and the defendant, no transfer by which the latter would secure any undue advantage could be permitted to stand, even though there might be no actual intent to defraud or overreach. In such a case the bur-



den would be upon the defendant to show the fairness of the transaction.

Directly we have only the defendant's testimony relative to the circumstances surrounding the transfers. As to the first deed, he explains, in substance, that when the settlement was made with creditors he induced them to release this small tract, and thereupon Green deeded it to him, with the statement only that he, Green, would have to call on the defendant for money from time to time. It does not appear that any price was fixed, or what amount, if anything, was ever paid by defendant on account of the transaction, or that the defendant ever recognized that he was under any legal obligation whatsoever; nor is any reason given why the actual consideration was not specified in the deed. As to the second conveyance, for the two hundred and six acres, we are advised that Green came to the defendant's office upon the date of the execution of the deed, and, stating in substance that the defendant had been kind to him and had rendered him many professional services, offered to deed the entire property, further explaining that if he, the defendant, didn't take it, it would in time pass into the hands of the mortgagee. The defendant, in effect conceding that the property was worth approximately three thousand dollars in excess of the indebtedness, testified that the reasonable value of his professional services exceeded that amount. But it does not appear that he ever kept any account



of such services or entered any charges therefor or suggested or intimated to Green that he expected compensation. And now we have only his general estimate of value, without any attempt to itemize or advise us of the extent or character of the services rendered. It is clear, I think, that there never was any intention to make a charge. Without advising Green of the consequences of the suggested step or attempting to dissuade him therefrom, defendant promptly accepted the offer and prepared the necessary deed, which was forthwith executed and delivered. Upon such delivery the grantor, a helpless old man, stood penniless, except for such contingent interest as the defendant had had the foresight to have reserved to him in the option to which we have referred. In view of all of the circumstances, the transfer to the defendant was not merely improvident; unless attended by an understanding that the title was to be taken in trust, or that the defendant assumed some obligations of support, touching which there is no testimony, the act was scarcely rational. No exigency had suddenly arisen. There was no imminent peril. The mortgage would not be due for three or four months. The mortgagee could not hope to secure a decree short of several months after the maturity of the indebtedness, and after foreclosure sale the deceased would have a year in which to redeem. Hence approximately two years must elapse before he could be divested of title by any involuntary pro-

ceedings, and in the meantime he might be able to effect a sale by which he could save something out of the wreck. Or, as an alternative, there was the possibility of making a fair settlement with the mortgagee, with an option to repurchase as in the other case. There was a very substantial margin even if the land was worth only fifteen thousand dollars, and when it is borne in mind that a shrewd, successful man of affairs had taken a mortgage upon it for approximately twelve thousand dollars, it is difficult to believe that it was not worth to exceed fifteen thousand dollars, the general rule being that mortgages are taken only for about fifty per cent of the value. Under the undisputed facts and the explanation of the defendant, it is unthinkable that either he, as a disinterested party, or any other competent person, would have advised or approved of such a transfer. Added to the inherent unreasonableness of the transactions,—if we assume the deeds to have been absolute and without other consideration,—is the circumstance that both instruments were for a long time withheld from record, and that in the case of each, after its execution and delivery, the grantor, acting under the direction of the defendant, represented to public officials that he was still the owner. But without further extending the discussion, it is sufficient to say that no theory or explanation of the transaction has been suggested upon which the transfers can be sustained. If upon the one hand we reject the

thought of deliberate, positive fraud on the part of the grantee, and upon the other the idea of total want of mental capacity in the grantor, we are left to assume either that the latter executed the instruments with an understanding of some kind of a trust or that he acted under a species of undue influence. Surely we cannot assume that acting with competent understanding he deliberately and without compulsion or consideration sought to pauperize himself. There are circumstances in the record tending to the view that he understood that he was to be the beneficiary of such value as the property actually had, but it is scarcely sufficient for a finding to that effect. Nor does the record expressly disclose a design in the defendant to unduly influence. But that is not essential. Whether we adopt one theory or the other the result is the same, and in view of the intimate relations of confidence between the parties, the age and impaired mentality of the grantor, and the want of adequate consideration, there is a strong presumption against the validity of the transaction, and this the defendant has failed to overcome. The law is well stated in *Highberger v. Stiffler*, 21 Md., 352: "Wherever," says the Court, "a fiduciary relation exists, legal or actual, whereby trust and confidence are reposed on the one side, and influence and control are exercised on the other, courts of equity, independent of the ingredients of positive fraud, through public policy as a protection against over-

weening confidence, will interpose to prevent a man from stripping himself of his property." And see also *Crabb v. Watts*, (Ore.), 249 Fed. 357; s. c., 257 Fed. 718; *Cadwallader vs. West*, 48 Mo. 483; *Cornet vs. Cornet*, 154 S. W. 121. As was said by the Supreme Court of Kentucky, in *Price vs. Meade*, 207 S. W. 695, 697: "The law looks with jealous and inquiring eye on a deed made by an old and infirm person to a young relative or associate for inadequate consideration, where the grantee has opportunity to influence the mind of the grantor, especially where no reasonable provision has been made by the grantor for his own children or nearest blood relation." See also *Nesbit v. Lockman*, 34 N. Y. 167.

Apparently the defense most confidently put forward by the defendant is laches. Clearly I think the plaintiff has not been wanting in reasonable care and diligence. She resided at Portland, Oregon, and was not intimately familiar with her father's affairs. She did not know of the transfers until 1918, and thereupon some correspondence ensued and negotiations looking to an adjustment were had, but with no result. And in 1919 she commenced a suit in the state court. When we consider that the controversy is between relatives, where there is a natural reluctance to litigate, and that, the grantor being dead, there was no direct source of information except the defendant himself, it is not strange that suit was for a time withheld. Nor



does it appear that there was negligence in first commencing the suit in the state court, and dismissing it there for the reason given.

With much greater force the defense can be urged against the interests which the plaintiff holds by assignment from a brother and a sister. It is thought that they acquired some knowledge of the deeds soon after their father's death. They still held their interests when the suit was commenced in the state court, and were there co-plaintiffs with this plaintiff. It was therefore about two years after they learned of the deeds before they took action in the state court, and about three years before this suit was commenced. But under the circumstances it cannot be said that this was an unreasonable delay. The interest that one of the heirs can claim is not in any view of great value, and the financial ability of the two assignors was such that they could not be expected incautiously to enter upon expensive litigation. It is not a case where one party permits another to take all the chances of an enterprise, and then, after success is assured, demands a share of the fruits, where he has been unwilling to share in the risks. If when the defendant disclosed to those assignors the fact that he held the deeds, he had offered to permit them to come in upon an equal footing with him, and thus share the chances of loss as well as of gain, and they had thereupon failed promptly to avail themselves of the opportunity, the defense



would present an entirely different aspect. The defendant was left to take few, if any, chances, after he disclosed the fact that he held the deeds. He had paid off the mortgages, and he made no considerable outlay thereafter; and as to the discharge of the mortgages, the value of the land was at all times at least sufficient to protect him against loss upon that account. He was not expending large sums in improvement or development, and the rentals were enough to return a small rate of interest after paying all expenses of maintenance and operation. In any decree which may be made, he may be fully protected; by restoring to him what he has paid out and awarding to him fair compensation, complete equity will be done.

As to the other defense, that the plaintiffs have not offered to reimburse the defendant for his outlay in discharging the mortgages, that is a matter touching which he may be fully protected in the accounting. Had the objection been raised at the threshold, the plaintiff might have been required expressly to plead an offer to do equity, but the defense is suggested now for the first time. Without more specific knowledge as to the defendant's rights, plaintiff could not have intelligently made a tender, and a general offer to do equity is of little value. Full protection of the defendant can now be required as a condition to granting the plaintiff any relief.

By agreement the securities received by the defendant upon a sale of the premises are, for the purposes of the decree, to be held in lieu of the lands. An accounting will therefore be taken upon the following basis: The defendant will be allowed at the rate of eight per cent upon moneys expended by him in protecting the title and in maintaining and operating the property, and will be charged at the same rate upon receipts. He will also be allowed a reasonable compensation for supervision and risk. The net amount thus appearing to be due him will constitute a first charge against the securities, and one-half thereof the plaintiff will be required to pay within a reasonable time to be hereafter fixed. The defendant will also be allowed a commission, at the current rate charged by real estate brokers, for selling the property, such commission to be paid out of the proceeds of the securities when the same are collected. One-half of the residue realized out of such securities, after reimbursing and compensating the defendant, will be awarded to the plaintiff.

Unless the parties can agree upon such an accounting, a further hearing will be had for the purpose, upon the suggestion of either party.

Endorsed: Filed Oct. 25, 1920.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

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INTERLOCUTORY DECREE.

Now at this time this cause came on to be heard on motion of the plaintiff appearing by Hugh Montgomery, her attorney of record, and defendants appearing by A. A. Fraser, their attorney of record, and the court being fully advised:—

And it having been found that under the circumstances and conditions attending their execution, that certain deed bearing date the 22nd day of December, 1914, recorded on the 19th day of February, 1916, in Book 75, page 13, of the Deed Records of the County of Canyon, State of Idaho, from R. E. Green, a widower, to J. L. Niday, conveying the following described real property, to-wit:

That part of the northeast quarter of the northwest quarter of Section 6 in Township 2 North, Range 1 West of Boise Base and Meridian, lying North and East of the right of way of the Oregon Short Line Railway Company, containing 6 acres of land, more or less, situated in Canyon County, State of Idaho; together with the ditches and ditch rights, and a water right consisting of 4 miners inches of the waters of what is commonly called the Ridenbaugh canal, owned by the Nampa and Meridian Irrigation District, under the rules and regulations thereof,

and that other certain deed bearing date the 1st day of October, 1915, from R. E. Green, a widower, to J. L. Niday, recorded on the 27th day of May, 1916, in Book 74, page 252, of the deed records of

Canyon County, State of Idaho, conveying the following described real property, to-wit:

The southeast quarter of the northwest quarter and lots numbered 2 and 3, and all that part of lot numbered 4 lying north and east of the right of way of the Oregon Short Line Railway Company, and the east half of the southwest quarter, except about three acres heretofore deeded to the Nampa and Meridian Irrigation District, all in Section 31, Township 3 North, Range 1 West, Boise Base and Meridian, containing 206 acres, more or less; together with the water rights, ditches and ditch rights thereunto belonging or in any wise appertaining,

are voidable at the instance of the grantor and his heirs.

And said lands prior to the commencement of this suit having by the said J. L. Niday, grantee named in said deeds, been sold and conveyed to George A. Buell and Effie Ada Buell, his wife, and A. L. Green, for a valuable consideration paid and to be paid to said J. L. Niday. And all of said heirs, either in person or through their assignees, and all parties to the suit having during the progress of the trial agreed in open court that the proceeds of said sale paid and to be paid to said J. L. Niday should stand and be considered by the Court in lieu of said lands, and having upon that condition expressed the desire that said sale be confirmed.



Now, therefore, it is ordered and adjudged that the title of said lands be, and the same is, hereby confirmed in said purchasers, George A. Buell and Effie Ada Buell, his wife, and A. L. Green, and that the heirs and parties hereto be recognized and treated as having such rights and interests in said proceeds of said sale as they would otherwise have in and to said lands.

It is further adjudged that in her own right as an heir, and as assignee by virtue of assignments from Philo F. Green and Gratia K. Acuff, two other heirs of said R. E. Green, deceased, the plaintiff is, subject to the conditions hereinafter named, entitled to a one-half interest in and to all of said proceeds.

And as a result of and in accordance with an accounting had by agreement of counsel, in harmony with certain rulings and directions of the Court, by which the said J. L. Niday is charged with all income received by him from said lands, including moneys actually paid to him on account of said sale, together with interest thereon, and is credited with all disbursements in caring for, maintaining, and protecting the title to said lands, with interest, including an allowance of \$900.00 for his personal services in that respect, and \$1500.00 as commission for effecting said sale, and the additional sum of \$900.00 advanced by him to the said R. E. Green following the execution of the said



deed of December 22, 1914, and in connection therewith, it is further adjudged that there is due said J. L. Niday, chargeable against the whole of said proceeds still unpaid, a balance of \$8,626.93, one-half of which, namely, \$4,313.47, is chargeable against the one-half interest to which, as aforesaid, the plaintiff is conditionally entitled.

Accordingly it is further adjudged and decreed that upon the payment or tender by the plaintiff to the said J. L. Niday of said sum of \$4,313.47, with interest thereon from the date hereof at the rate of eight per cent per annum, on or before the first day of March, 1921, a final decree will be entered confirming in the plaintiff a one-half interest in and to that certain mortgage bearing date the 14th day of December, 1918, and recorded at page 279 of Book 70 of the Mortgage Records of Canyon County, Idaho, from A. L. Green, a bachelor, and George A. Buell and Effie Ada Buell, his wife, to J. L. Niday, covering the above described real property, together with an undivided interest in the note secured thereby, the same representing the balance of the purchase price for the sale of said lands not heretofore paid in cash to the said J. L. Niday. And upon the failure of the plaintiff to make such payment or tender within said time, the suit will be dismissed with prejudice. In case such payment is made as required, the final decree

will also provide for the custody and collection of said note and mortgage.

Jurisdiction is retained to make further adjustments in case of any disbursements or receipts by the said J. L. Niday in the intervening period on account of said note and mortgage, and for the modification of this order for good cause shown.

Dated this 23rd day of December, 1920.

FRANK S. DIETRICH,  
*Judge.*

Endorsed: Filed Dec. 23, 1920.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

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DECREE.

Now at this time this cause came on to be heard on motion of the plaintiff for a final decree, the plaintiff appearing by Hugh Montgomery, her attorney of record, and defendants appearing by A. A. Fraser, their attorney of record, and the Court being fully advised:—

And it appearing that since the entry of the interlocutory decree herein on December 23, 1920, and in compliance with the requirements thereof, the plaintiff has duly tendered to the defendant J. L. Niday the full sum of \$4,313.47, together with interest thereon from the date of said interlocutory decree to the time of such tender, at the rate of

eight per cent per annum, and in all other respects has complied with the conditions and requirements of said interlocutory decree.

It is therefore ordered, adjudged, and decreed that the plaintiff, Julia Green Graef, is the owner of an undivided one-half interest in and to that certain mortgage bearing date the 14th day of December, 1918, and recorded at page 279 from book 70 of the mortgage records of Canyon County, Idaho, from A. L. Green, a bachelor, and George A. Buell and Effie Ada Buell, his wife, to J. L. Niday, covering the property particularly described in the interlocutory decree, together with an undivided one-half interest in the note secured thereby, the same representing the balance of the purchase price for the sale of said lands not heretofore paid in cash to the said J. L. Niday.

And the parties hereto having this day filed herein their stipulation in writing providing for the temporary custody and ultimate disposition of said \$4,313.47, and interest thereon, heretofore tendered to the defendant J. L. Niday, and also for the custody, collection and disposition of the proceeds of said note and mortgage.

It is further ordered that said stipulation be, and the same is, hereby approved, and accordingly it is ordered that within ten days from the date hereof the plaintiff deposit in the Boise City National Bank, of Boise, Idaho, said amount so tendered, and

that the defendant J. L. Niday deposit in said bank an assignment in due form of a one-half interest in and to said note and mortgage, together with said note and mortgage, properly endorsed to the plaintiff without recourse, all in accordance with the terms of said stipulation.

It is further adjudged and decreed that in all other particulars not herein expressly referred to said interlocutory decree of December 23, 1920, be, and the same is, hereby confirmed.

It is further adjudged and decreed that the plaintiff recover from the defendant J. L. Niday her costs herein incurred and heretofore taxed, namely, \$258.42.

Dated this 26th day of February, 1921.

FRANK S. DIETRICH,

*Judge.*

Endorsed: Filed Feb. 25, 1921.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

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#### APPELLANT'S STATEMENT ON APPEAL.

BE IT REMEMBERED that this cause coming on for trial before the Court on October 4, 1920, the plaintiff being represented by Mr. Hugh Montgomery, her solicitor, and the defendants by Mr. Alfred A. Fraser, their solicitor, the following proceedings were had:



The plaintiff, JULIA GREEN GRAEF, called as a witness on her own behalf, being first duly sworn, testified as follows:

I am the plaintiff in the present proceeding. I am the fourth child of Mr. R. E. Green, deceased. There were six children in the family. My father was a kindly, refined, intellectual man, whose business was mostly devoted to office work. For many years he was active manager of the Boise and Nampa Canal Company, a man given to books, art studies, and things of nature. My mother was an energetic, active, alert business woman. My mother was the active manager of the ranch owned by father and mother. Father and mother first went to live at Greenhurst in the year 1900. Prior to that time we lived in Boise. My father was about sixty-four years old when they moved to the ranch called "Greenhurst." My mother was forty-five or forty-six. She died in the year 1909. I went to Greenhurst the day before the funeral. I stayed two weeks. After the death of my mother my father seemed stunned and broken. I next saw father about 1911. I went to the ranch on a visit at that time. Our father had always been a great reader. After mother died he just seem to sit down with a book and quit. He would sit there by the hour and read, instead of being chatty as he used to be. I next saw father in the fall of 1914. He no longer attended to any business. He puttered



around the yard, sat, read, and dozed by the hour. Mr. and Mrs. Niday were attending to his business at that time. Mrs. Niday kept up a correspondence with me and mentioned in letters that dad had moved to Boise. They were quite friendly letters. I have not kept them. I had no oral discussion with her to any great length about father's affairs. I next saw father in 1917. Father seemed just about—well, his collective faculties were gone. He would start to tell you something and he couldn't talk consecutively. He would just end off in a mumble. I saw him in 1912. He came down to the beach and stayed a short time. His interest seemed gone even then. He would go down to the library and get two books a day. Go back every morning and change those books. Would buy every magazine he could find and just sit and read. At the time of my interview with father in the summer of 1915 I had just scattered conversations with the defendant J. L. Niday concerning father's affairs. Mostly Mrs. Niday told me the condition of affairs. I was there about two weeks. Mrs. Niday explained to me prior to that in letters and during that time that they had taken charge of father's affairs, that they were in a complicated condition, and that they had moved him to Boise. Neither Mr. or Mrs. Niday at that time advised me that father had executed and delivered to the defendant J. L. Niday a deed to the property known

as Greenhurst. I first learned of that fact in the spring of 1918, over a year after father's death. Mrs. Egbert, my aunt, came to Portland on a visit, and in a conversation asked us if we didn't know that Niday had a deed to Greenhurst.

Plaintiff's exhibits 1 and 2, being certified copy of a deed dated December 22, 1914, and certified copy of a deed dated October 1, 1915, admitted in evidence.

The summer following the removal of father to Boise Mr. Niday at one time told me that father hadn't been capable of attending to his affairs in his opinion since mother died.

#### CROSS-EXAMINATION.

By MR. FRASER.

I was present at Greenhurst the day before mother's funeral. Father at that time seemed very much broken up by the death of his wife. Father relied a great deal upon mother in a business way. She was the active business manager, and it seemed to take his prop away. My father was certainly a pretty good business man. He occupied responsible positions in this state. He was active manager of the Boise and Nampa Irrigation canal for a number of years; had charge of the running of the canal, collecting all moneys due, and hiring the men. He was the head of that business. My mother did not run the canal and took no part in it. At one time he was representing

parties who owned several thousand acres of land here. He took care of that business also, satisfactorily as far as I know. My mother took no part in the transaction of that business. My father was a rather highly educated man. He took great interest in books and magazines. I stated that at Seaside my father would go down to the library and get a couple of books each day and come home and read them, and that he would buy a great many magazines. That was a habit of my father's more or less for a great many years, but not to that extent. He had not a great deal more leisure at Seaside to read these books than while attending to business. There were children and other things to take his attention. I saw my father in January, 1917. He had been ill and in the hospital. I know he was in the hospital in 1917 through letters received from my sister. She also telegraphed it. She wrote me that he was suffering from pneumonia. I first discovered the fact that Greenhurst had been deeded to Mr. Niday in April, 1918. I was in Portland at that time. After she informed me I wrote to Mr. Niday in regard to the matter. I asked for an explanation. A suit was filed in the state court to set aside this conveyance to Mr. Niday prior to the beginning of this suit. A suit similar to the present one was filed in Canyon County. It was transferred to Ada County for trial. After the transfer to Ada County I had the

suit dismissed and then filed the present suit. In the action in the state court the parties plaintiff with myself were Gratia Green Acuff and Philo F. Green. Gratia Green Acuff is my sister and Philo F. Green is my brother. Gratia Green Acuff resides at Rupert, Idaho, and Philo F. Green resides at Jerome, Idaho. They resided there at the time of filing the complaint in the district court of this state, and they reside there at the present time. I have purchased their claims and have an assignment of them.

Q. For what purpose?

A. For the purpose—

Q. Why did you purchase these claims and take these assignments?

A. They became tired and impatient of the delay, and were willing.

Q. Was it for the purpose of bringing an action in this court?

A. I don't know that it was especially.

Q. I am asking you were you not informed that in order to bring this action in this court that you had to become the purchaser of their claims, they being residents of this state?

A. Not that I had to do it. They offered to sell out prior to that.

Q. You were advised that you could not bring this action, were you not, unless you did do it, Mrs. Graef?



A. Mr. Graef largely attended to these details.

Q. Didn't he inform you of that fact?

A. Not especially. On a trip east he took their interest.

Q. Why did you dismiss in the state court; what was your reason?

A. That was up to Mr. Graef as my agent. Mr. Graef represented me in the matter. It was to expedite this case, I suppose. It was delayed in the other court.

I paid those other parties two hundred dollars each for their claims, in full of all demands. They have no interest in the result of this suit. I am the sole plaintiff.

#### Defendant's EXHIBIT 1

admitted to evidence.

That is my signature to defendant's exhibit No. 1. I wrote that letter. This letter is dated Portland, Oregon, March 27, 1917. I presume that is the correct date. It is addressed to "Dear Mr. Niday."

Q. I will call your attention to this statement in this letter: "I want you both to know that whatever you decide about father's affairs is all right with us." Whom did you mean by "us"?

A. Mr. Graef and I, under the impression that Mr. Niday was absolutely fair and square with father. We trusted him.



Q. Then this next, "We sincerely hope that you will be able to swing yourself out of the ranch debt." What ranch did you mean?

A. Greenhurst. Then when Mr. Niday got affairs adjusted it would all be straightened out. I did not know then that Mr. Niday had a deed to Greenhurst ranch. I meant that Mr. Niday would be able to adjust it and pay off whatever indebtedness was there. I meant that affairs would be straightened around. Mrs. Niday said Mr. Niday took charge and would pay up outstanding debts and when the ranch could be swung clear whatever was left would be divided among the children.

#### RE-DIRECT EXAMINATION.

By MR. MONTGOMERY.

The letters I destroyed which I received from Mrs. Niday were letters written by her before we learned of this deed. After we learned of this deed I wrote two letters to Mr. and Mrs. Niday, asking for an account of father's affairs for one thing, and being sent to all five other children, so that each would know the same thing. That was all we knew, just what Mrs. Niday had chosen to tell us. I wrote the second letter and asked for the items of debit and credit on father's affairs, and in neither case could I get them. After 1914 Mrs. Niday advised me that there was enough out of his property to maintain Mr. Green.

PLAINTIFF'S EXHIBITS Nos. 3 and 4 admitted in evidence.

Plaintiff's Exhibit No. 4 was received unsigned. It was just an omission and it was intended to be signed by Mr. Niday and was written by him. Plaintiff's Exhibit No. 3 is the answer to the first letter I wrote, asking for an accounting. Mr. Graef entirely handled the transaction of purchasing the two claims of Gratia Green Acuff and Philo F. Green. Receipts were issued to Mr. Graef. He was my agent. I know the contents of those receipts.

PLAINTIFF'S EXHIBITS Nos. 5 and 6, being the receipts above mentioned, admitted in evidence.

All the details of that transaction regarding the purchase of the claims of Mrs. Acuff and Philo Green were handled entirely by Mr. Graef. He made the arrangements, acting in my behalf. The proceedings regarding the dismissal of the case in Canyon County, Idaho, and the institution of the present one were carried on solely by my attorney. The action was taken solely by my attorney and not by me.

GRATIA K. ACUFF, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

I am one of the daughters of Mr. R. E. Green,

deceased, the fifth child. There were six of us altogether. I formerly lived at Greenhurst, about 1900. That was about the time father moved there to make their home. I lived there until my first marriage in 1910. After my marriage I often visited at Greenhurst. I lived within three miles. On the occasion of these visits I constantly saw my father. I was at Greenhurst at the time of mother's accident and her death. I was then in close association with my father as a companion. The effect upon father caused by the death of his wife was that he seemed crushed and broken. From that time on he never was cheerful and pleasant at all times like he used to be. He would have long fits of despondency, feeling being crushed, a tendency to get off by himself and wander around the hills alone. He was not allowed to do that. I went with him as his constant companion. I had been before and was after mother's death his companion. Feeling the need of greater association with him, I stayed with him constantly. During the later times, after my mother's death, he never talked during those walks. He would walk for miles and he wouldn't say a word. I went with him as caretaker, not in a sense of his seeming to need care, but companionship. He was very abnormal at this time compared to what he was before mother's death. Prior to that he was happy, talkative, helpful. At the time of mother's death I

would imagine father was about seventy to seventy-two years of age. My companionship with my father continued until his own death, at intervals. I was gone teaching. I was never gone more than five months. As the years progressed following the death of my mother this changed condition of father continued. He grew worse. In the summer of 1914 he was unable to help me as usual with the study of advanced English. He had always been prone to read a great deal and to study. He was very fond of narrating stories to me. He had no capacity to read a page of literature and tell what he read. He couldn't help me, and he knew he couldn't. He was conscious he was failing. He wanted to help, but couldn't. I asked him to help and he grieved that he couldn't help. He tried it and failed. He said he was not mentally alert enough to do it any more. He showed a continued unwillingness to take hold of things and let someone else do them instead. Unwillingness to mentally assert himself. Just mental inactivity. In 1914, right after my father had moved to Boise, my father did not know me on the street. I met him at the car track rather suddenly and expressed joy to see him. He didn't know me. He knew when to go downtown. He knew how to get off at 8th street corner because the car stopped there. He automatically got off the car, but when he came to go home he would not know always when



to get off at Alturas street to go home. He would get lost, could not find himself. The neighbors would sometimes bring him in. Sometimes I would find him. I have assisted him home under that condition during the year 1914. Mr. and Mrs. Dr. Patterson came often for him in the automobile to take him for drives. He enjoyed it very much. At those times he never would speak unless absolutely forced to. He was extremely abnormal. In the fall of 1914 after he came to Boise I have seen him in the presence of J. L. Niday and Mollie Green Niday. I made observation at that time of their attitude toward him. My sister Mrs. Niday's attitude toward him was not one of daughterliness or kindness. It was one of criticism, impatience. Mr. Niday frequently was impatient, trying to hurry him. This conduct upon their part had the effect of making him disturbed mentally and very unhappy. I always noticed from some time in early 1914 on the occasions of my father's association with Mr. Niday that after those meetings my father would be unhappy and disturbed. I could not get his confidence. I was his companion. I could not draw him out. I have seen him manifest trembling in the presence of Mr. Niday. In January, 1915, I went away from home to teach school. My father was extremely disturbed and worried because he was under the belief of pauperism. He grieved because he could not support me



without me working. He wanted the protection around me and he could not furnish it as he wished. That disturbed him. He expressed himself as poverty-stricken, living upon the bounty of Mr. and Mrs. Niday. He often talked to me of it. In 1915 I have seen him run down the street with his arms outstretched after Mrs. Wager, my aunt. She was keeping house for my father. Mrs. J. L. Niday, my sister, said to me that my father was off. That was often mentioned. The first time I can accurately remember it was along in December, 1914. In December, 1914, my sister, Mrs. Niday, tried to make my father do things that he could not help, do things that would overcome his infirmity. My father was afflicted with partial palsy and his hands could not be controlled. My sister attempted to have him keep his hands still. He felt this keenly because he couldn't do it. She addressed him impatiently in my presence, many times very unlovingly, about his forgetfulness and his mental condition. I have heard her say that he was crazy, not to him, but he heard it. I returned home in June, 1915. Mr. and Mrs. Niday seemed more aggressive at that time. My father felt shoved and pushed. My father would openly at times resent being hurried. He seemed not able mentally to grasp what was needed or wanted of him. I have heard and seen Mr. Niday speak impatiently to my father to hurry him to do business

affairs of some sort. What they were I don't know.

Q. What is that document you are referring to?

A. Those are my notes of dates, so that I will remember them.

Q. When were they made?

A. They were made when I knew positively that I would need them in the court-room. They were made when Mr. Graef took over the management of this case for us, some time last year.

I talked to my father in the fall of 1915. I tried to talk to him about his business affairs, but with no success. He was reticent. Every time I asked for information he would say that Mr. Niday was caring for it and it would be all right. In the spring of 1916 my father made a visit to my home during the summer months.

Q. Did you during the period of that visit notice any incidents or have any conversation with your father which would indicate his mental condition?

A. I did.

Q. State what it was.

Question objected to as the witness has testified to facts occurring long after the transfers sought to be set aside were executed and delivered and conditions might change between those times.

THE COURT: She may answer. The objection is overruled.

A. It was necessary when he came to my home to come with a young lady who brought him there. He was not able to travel alone. He would lose himself. He constantly interfered with the work of the workmen on the ranch until it was necessary to tell them that he was not entirely responsible. He displayed a very great tendency toward little, insignificant details that he was never troubled with before. For instance, when Mr. Acuff and I put father to bed he would insist on having his clothing, little details of clothing, right beside the bed where he could put his hands upon them. This was a mania with him. He would have me come downstairs at night, go into the clothes closet and tell him which clothes-hanger his coat was on. He would wring his hands and cry, "I have ruined my children." That would happen every few days while he was there. He would sit at first for hours, perhaps staring down, then perhaps straighten back in a limp condition of exhaustion and utter despair, and that was on his mind continually, that he had not done the right thing by his children, and he voiced it and spoke of it. Just prior to father's death Mr. Niday took my father from my arms where I was holding him in a chair. It was necessary; he could not stand alone; and his power of speech was greatly impaired. Mr. Niday wished him to sign a paper. I did not know what the paper was. I allowed Mr. Niday to take my

father from my arms. He took him and walked him up and down the floor, talked very loud, and forcibly took him, trying to arouse him. My father could not be aroused. It was too late. And Mr. Niday thought he could be aroused to sign a paper. He could not. That is all I know of that. After the fall of 1914 I made contribution towards my father's support. I was led to believe by Mrs. Niday that my father was a pauper. Mrs. Niday asked me to give five dollars a month toward the support of the family, the care of father's household, of which Mrs. Wager was the head or caretaker. I gave five dollars a month for a period of about a year and a half. She advised me that my brothers were giving five dollars and that she and Mrs. Graef were giving twenty dollars apiece toward the support of the family. When I said Mr. Niday was attempting to get my father to execute an instrument my brother, John M. Green, and my aunt, Mrs. Wager, were present.

Q. Did you prior to the death of your father know anything concerning the execution of any deeds to the property formerly your home place known as Greenhurst, and more particularly two deeds which have been marked plaintiff's exhibits 1 and 2, which I now hand you?

A. I knew nothing of these things until my father's death. I first learned of their execution



immediately following my father's death. My brother Jim told me.

The mental condition of my father immediately prior to the 22nd day of December, 1914, and the first day of October, 1915, was one of absolute submission to another's will, absolute submission, with aggressive domination.

#### CROSS-EXAMINATION.

By MR. FRASER.

I lived at Greenhurst continuously until mother's death in 1909. I made that my home. During these years I never noticed anything peculiar about father or any mental deterioration during those years, until after my mother's death in the spring of 1909. When mother died that began the condition that I spoke of. I noticed this condition immediately after my mother's death, the same day. It came on immediately after the death of my mother, but very gradually. My brother, John Green, was at Greenhurst the day of my mother's death. I did not say anything to him about the condition of my father at that time. The first time that I spoke to my brother or sister in relation to this condition of my father I think was some time soon after we moved to Boise, in the year 1914. From 1909 until 1914 I had noticed this condition of my father's, but said nothing about it to my brothers and sisters until 1914. My father was living at North 6th street here in Boise at the time



I discussed the matter with him. I believe I talked with all of them more or less. In October or November, 1914, we discussed ways and means of bettering his condition mentally, making him happier. And my talk with Mrs. Niday was on the point of making it more pleasant and agreeable for my father while he was living there. While I was living at Greenhurst after the death of my mother I went to father for assistance in higher English. He was unable to help me as he had formerly done. I could not tell you what book on higher English I was studying out of at that time. I had a volume of short stories, the *World's Greatest Short Stories*, from which I was to be examined at a teachers' institute. I asked father to give me a review of these short stories and he was unable to do it. I think that was in 1914 in the summer time. Another incident which I recollect is that he would forget to bring things that he was asked to bring. He went downtown frequently and showed himself generally forgetful. I put that down as a sign of mental deterioration, because he had never manifested that before. He had always had a great capacity for detail. I was not in the habit at that time of studying the mental attitude or condition of mind of people I associated with or talked with. I do now. And when I speak of the condition of my father's mind I don't speak of that condition based on my knowledge of Christian Sci-

ence. I tried at one time to have father take up the treatment of Christian Science because all else failed him. Once in a while I gave him books to read upon that subject. He didn't read it to amount to anything. He could not. He read the book upside down. I guess he was able to read it upside down. He got some benefit. I stated in my evidence this morning, as one of the evidences of father's mental condition, that he felt very badly by reason of that fact that he wasn't able to support me better than he had. That statement was made in 1915. Prior to 1915, while I lived with father, I received all those things which I think were necessary for my welfare, and in 1915 was the first time he told me that he was financially unable to give me those things he would like to give me. I testified that I took walks with my father after my mother's death out over the farm and that we would walk quite a distance and father would not talk much. I absolutely consider that an indication of failing mental ability. I did not say anything about it to my brother John at that time. Everybody knew father's condition and could see it. In 1910 I was married. After that I lived three miles distant, but saw father frequently, used to visit back and forth. When I was married I left the old home. I did not tell John, my brother, to look after father, that he was mentally unsound and unable to take care of himself. I did not tell him

that at any time. I had sufficient trust in my brothers and sisters that they were interested in doing their level best, as I was. It wouldn't be necessary at any time to tell my brothers and sisters to look after my father. They were taking the very best care of him as they knew how on the ranch. After father came to Boise my aunt, Carrie Wager, took care of him. My brothers and sisters were always in and out of the home. Mr. and Mrs. Niday purported to support him and, of course, I understood that they were taking care of him financially.

#### RE-DIRECT EXAMINATION.

By MR. MONTGOMERY.

Q. In order that the record may be clear, Mrs. Acuff, you suggested to counsel that you did not mean, in your direct examination, that the one act of being unable to support you was evidence of insanity. Do you recall in what way you used that reference, in your father's inability to take care of you?

The fact that my father was unable to support me caused him intense worry and unhappiness on his part. Ordinarily if he had been normal mentally he would never have taken such a stand. He was miserable, unhappy, and disturbed.

GEORGE H. MOORE, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## DIRECT EXAMINATION.

By MR. MONTGOMERY.

At the present time I am engaged in the credit and commission business, located at Nampa, Idaho. In the spring of 1915 I was treasurer of the Nampa & Meridian Irrigation District and operating a little farm. During this period of time I was acquainted with Mr. R. E. Green. In November of 1914 I received a personal call from Mr. R. E. Green at my office. He called to see me and apologize for a letter which he had signed and sent to me. He said he did not write the letter, that he had signed it under duress, and he **wanted to apologize** for it. He said Mr. Niday had written the letter and that he had signed it under protest, said he thought I knew him sufficiently well to know that he would not write a letter of that kind.

Letter introduced in evidence and reads as follows:

On the letter-head of "J. L. Niday, Attorney-at law":

"Boise, Idaho, March 8, 1915.

"Mr. G. A. Remington, Secretary, Nampa & Meridian Irrigation District, Meridian, Idaho.

"Dear Sir:

"Answering your letter of the 4th inst., relative to the 35-acre tract of stored water, it has been my intention to use the water on the southeast quarter of the northwest quarter and lots 2 and 3, and all



that part of lot 4 lying north and east of the right-of-way of the Oregon Short Line Company, and the east half of the southwest quarter, except about three acres heretofore deeded to the Nampa & Meridian Irrigation District, all in Section 31, township 3 north, range 1 west, and a small tract adjoining, making 212 acres, when the time came for its application to the lands, but inasmuch as this water will not need to be applied until some time in August, I prefer at this time to leave it open. It can not in any event be made appurtenant to the land until applied, and when ready for application I will direct you advisedly concerning the matter.

“Very truly yours, R. E. GREEN.”

I am familiar with the values of farm property in and around the neighborhood of Nampa. Have lived in Nampa for twenty years. I am familiar with the property known as Greenhurst, formerly belonging to R. E. Green, deceased. I was familiar with the property in 1915. I would say that the market value of the 212 acres known as Greenhurst in the fall of 1915 was \$25,000.00. I was acquainted with Mr. Green prior to the time of his visit to my office of which I have spoken, in a general and in a business way. In the fall of 1914, on the occasion of his visit, I noticed that he was physically and mentally sick and remarked to



some of the boys in the bank as he went out and called attention to his condition.

#### CROSS-EXAMINATION.

By MR. FRASER.

I have not got the letter that Mr. Green came in to see me about and apologize for. I left it in the files of the office. It had reference to the appropriation of water to the lands owned. It was a business letter. The letter was abusive, and he told me it was written by Mr. Niday and that he had just signed it. He apologized and said he had no desire to hurt my feelings. I didn't take that as an indication of mental weakness, the fact that he came there to apologize in regard to that letter. It was at that time that I noticed his failing mental condition. I also noticed the hesitating way in which he brought the matter up and the feeble way he presented it. He was physically feeble, an old man at that time. I can't tell just when I saw him before that time. I saw him often as long as he lived in Nampa, but since his removal to Boise I had not seen him so often. He had been in a few days before, however, and had transacted some business in connection with the office. He did not seem able to transact his business as he had in years before. He was able to tell me what he wanted and what he desired. There were no foolish questions asked. The fact that he was desiring to have his water changed from land to which

it was appurtenant to land to which it was not appurtenant, and changes which I was not legally in position to make, was the fact by which I arrived at the conclusion that he was mentally unsound; that and the way he presented his arguments, and the way he conducted himself, not so much what he said as the way he said it, the hesitating way in which he approached me and brought the subject up in the first place. I am acquainted with this 212 acres of Greenhurst ranch. I should say there is little more than a hundred acres cultivated now. Some of it is not cultivated. Some of it is not cultivated this year that was cultivated two or three years ago. It is hard to irrigate. There is in the neighborhood of eighty to a hundred acres of this land that is in sagebrush at the present time and has never been cultivated. I would not say that there are no alkali streaks on the hundred acres which are cultivated. The land which is not cultivated I would estimate it from fifty to a hundred dollars an acre. The land which is cultivated would be worth \$250.00 an acre in 1915. I don't recall of any lands in that vicinity that were sold in the year 1915 for \$250.00 an acre. There has been an increase in the value of lands between 1915 and 1918 in that vicinity. I would value the land in May, 1918, at \$30,000.00 or better. The decided increase in the value of land has taken place within the last two or three years. There has been a

decided increase in the value of farm lands in the last two or three years. An increase of from fifty to one hundred per cent. It depends on the location and water right, etc. I am familiar with the other part of Greenhurst ranch that is across the road and not included in this two hundred acres, land in section 36. Part of this land is exactly of the same nature as the Greenhurst ranch. As a rule I would rather have the other land than Greenhurst, exclusive of improvements, you understand. I think the land in section 36 will go to alkali quicker than the Greenhurst ranch. Eventually I think they both will become bad by water coming down and alkali coming up. I take that into consideration when I fix the value at \$25,000.

Q. Do you think a purchaser would pay \$25,000.00 for it with that condition facing him in the future?

A. He would be in the nature of a sucker, but they do it.

#### RE-DIRECT EXAMINATION.

By MR. MONTGOMERY.

The land described in paragraph 8 of the complaint is the property concerning which I have testified to as to value.

PLAINTIFF'S EXHIBIT No. 7 offered and admitted in evidence, being a certified copy of a deed from J. L. Niday and wife, bearing date December 14, 1918, to A. L. Green and George

A. Buell, showing consideration for the transfer the sum of \$30,000.00.

JOHN M. GREEN, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

I am one of the heirs-at-law of R. E. Green. That letter bearing date June 3, 1918, was written by me. From September, 1909, to March, 1917, the time of the death of my father, I was generally familiar with his physical and mental condition. I made no detailed study of his mental condition. I had no talk with Mr. Niday with reference to the nature of Mr. Niday's relation to the property which my father is alleged to have deeded to him. I understood we turned everything to Mr. Niday's hands to save the ranch. I had a talk with my father after he was sick in the hospital, after 1917. I asked him whether he had faith in Niday and he said he had. I noticed he was running down quite fast. He expressed himself in one conversation with me and said, "O God, what have I done?" He never expressed himself as living in fear of Mr. Niday.

Q. Now, Mr. Green, in order to be perfectly fair, I will ask you if you will please read carefully the letter to which I direct your attention (handing paper to witness)?



A. I wrote that. I was mistaken in the statements contained in the letter.

MR. MONTGOMERY: If the Court please, in view of the statement of the witness, who, I appreciate, is my witness, I desire to invoke the aid of the provisions of the statutes of this state allowing the introduction of declarations made contrary to the declarations made upon the witness stand, and now offer the letter in question for that purpose, not a basis of impeachment, but as showing a contradictory statement.

MR. FRASER: I object to it for the reason that they can not impeach their own witness, and it has that force and effect, if anything, and it is not competent for any purpose.

THE COURT: It may be offered for the purpose of impeachment, but not for any other purpose, that is impeachment by showing that he made contradictory statements. It would simply neutralize his present statement.

Said letter marked

PLAINTIFF'S EXHIBIT NO. 8,  
admitted in evidence.

Letter dated June 3, 1918, addressed to Mr. J. A. Graef, Portland, Oregon:

"Dear Joe:

"I have never talked with Niday about the ranch, but have always understood that property was held by him in trust and if could be sold above



the mortgage and expenses the balance would be shared equally among children. I understood the deed made to protect property from litigation, in other words, to gain more time to clear indebtedness. Services rendered by Niday were free gratis, as I have heard him remark. Father was always grateful to Niday, but as for giving his children's inheritance to him there must have been undue influence. My father in his last days was afraid of Niday and worried to death over something that had happened. I took care of him during the last two months of his illness and often he would exclaim, "My God, what have I done." He was sick and ailing over a year and at times completely out of his mind, and at any time during the last eighteen months preceding his death I would not consider him responsible for anything he might do. He was forgetful, absent-minded and not physically able to attend to business. The Dewey mortgage was taken up by Niday, as Jim stated to you, and if the children could raise money the ranch would be turned over to them. I will certainly be with you if lawsuit is necessary, but I have thought Niday would do the square thing. Father and mother had confidence in him. Niday never stated to me or others in my presence that the property was to secure him for money advanced. Gratia and Philo went to see Niday after the funeral, and if you have not written them, would be wise to do

so. Now, Joe, it is very kind of you to take this step and offer to bear expenses if no recovery. It is no more than right that you should be repaid if suit is won. Thanking you for all favors and with love to Jule and children, I remain, Yours truly,  
JACK."

That is my letter all right. The letter is true.

#### CROSS-EXAMINATION.

By MR. FRASER.

This letter that has just been read to me refers to a period of time after my father's sickness in the hospital. I think he was sick about eighteen months. In 1916, about two weeks before he was taken to the hospital, I was up at the house and had a talk with him. I did not think there was anything mentally wrong with him at that time. When he went to the hospital they told me he had pneumonia. It was after he went to the hospital that he said, "O my God, what have I done." I do not know what he had reference to when he made the statement. I do not know whether he meant that he had given his property away or sold it or whether he was in debt.

#### RE-DIRECT EXAMINATION.

By MR. MONTGOMERY.

When I said in the letter that father was always grateful to Niday, but as for giving his children's inheritance to him there must have been undue influence, it must have been before he got in the

hospital, about two weeks before. I thought maybe Mr. Niday had persuaded him to turn over the ranch to him. When I said in that letter, "My father in his last days was afraid of Niday and worried to death over something that had happened," he did not tell me what it was. I got the impression from talking with father that Mr. Niday took over the ranch to save the ranch.

#### RE-CROSS EXAMINATION.

By MR. FRASER.

I did not have any knowledge of my own of this transaction between my father and Mr. Niday. I had no knowledge as to whether or not Mr. Niday paid anything for it, no knowledge on the subject at all.

JOHN CLARK, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

By. MR. MONTGOMERY.

My name is John Clark. I am engaged in farming. During the year 1916 I rented the property known as Greenhurst from Mr. Niday. I gave him one-third of the wheat. The rest was pasture land. And I gave him half of what I collected off the pasture. It amounted to one thousand to twelve hundred dollars somewhere that he received.

## CROSS-EXAMINATION.

By MR. FRASER.

I did not pay the taxes or the water rent.

JOHN LEASH, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## DIRECT EXAMINATION.

By MR. MONTGOMERY.

I am engaged in farming. During the year 1915 I rented the property known as Greenhurst from Mr. Niday. It is what you call the old ranch, the Greenhurst ranch, consisting of three hundred acres and better, and I gave cash rent of \$1910.00. I had a lease of one year, with the refusal for three years. I would not put myself up as an expert on the value of lands. I judge the value of land from what it will produce and what I make off of it. I was on the place one year. I first took notice of the sales of land in that vicinity in the summer of 1916. In a general way I had some knowledge prior to that, but not in that immediate vicinity. I don't know of any being sold during the time I was there. For a general purpose farm I consider it one of the best in the valley, that is, growing crops and stock feeding. In my opinion the value of the Greenhurst ranch, 212 acres, in the fall of 1915, would be about \$125.00 an acre.

## CROSS-EXAMINATION.

By MR. FRASER.

That is the 212 acres on the east side of the road. There is about 150 acres of it under cultivation, blue grass and cultivation. There was some of the land not under cultivation I considered the most valuable part of it. There is a few acres that can not be excelled in the state as a feeding ground, lava rock bottom. There is a corral and feed racks and so on. The other that is not in cultivation, the creek runs all the way through it. A fine place for stock and cattle, running water, and there is only about fifteen acres that can not be farmed. I leased it in 1915 and paid \$1910 for the whole farm. That \$1900 that I paid in rent included one hundred and eight acres on the west side of the road. I paid \$1110 rent for what is now known as the Greenhurst. I do not know of any land being sold over there in 1915 at \$125.00 an acre. I lived in that neighborhood one year. On the lower side of this hundred acres there is three or four acres alkali. That is all I noticed.

CARRIE WAGER. produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## DIRECT EXAMINATION.

By MR. MONTGOMERY.

My name is Carrie Wager. I reside at the present time in Portland. After the year 1909 I resid-



ed in Idaho at Greenhurst ranch. I came to Idaho on a visit to my mother and Mr. Green's family. My mother was Mr. Green's mother-in-law. I remained there from the last of May until the last of November, 1913, when I went to Ohio. I came back in 1914 to Boise. I received a telegram from Mr. Niday. In response to this telegram I immediately got ready to take the journey and arrived on the 21st of November, 1914, at Nampa, and saw Mr. Green at that time and conversed with him just a few moments. I went into the dining-room where he was eating and went up to him and he looked at me, a kind of strange look, and he did not know me just the moment I spoke to him, and then he said, "Why, this is Carrie," and he shook hands with me and kissed me and was glad to see me. I had known Mr. Green ever since I was twelve years old. I noticed his condition and I should say he was depressed and seemed to be crushed. In the fall of 1914, after I arrived in Nampa, I went to live in Boise, 1620 North Sixth street. I kept house for my mother and Mr. R. E. Green. When I first went there I had charge of the home, to take care of it. During this period of time I saw Mr. Green constantly. I continued to remain there up to the 16th day of March, 1917. Mr. Green passed away and I left the place the following week. During the period of my residence in Boise from the fall of 1914 until Mr. Green's

death I made observations with reference to his general physical and mental condition. In the first place he seemed to be so nervous. He would pace the floor and wring his hands and he would follow me wherever I would go and watch for me, and he would go down the street and he would come back and say, "Well, Carrie, I got lost again," and I said, "Mr. Green, you have lived here so long in the city don't you know where you live yet?" "Well," he says, "I got lost. I got off at the wrong street and got lost." He would sit and figure and write figures and then he would tear it all up and put it in the stove. I did not carry on any conversation with him regarding his business affairs. You could not approach him in his business. I never did. During that period of time I noticed a change in Mr. Green from former years. Mr. Green was a very sociable man and he liked to have company, but after we went to Boise he would just sit and never say anything to any of us. He was a great card player and we used to play cards there, but after we went to Boise he never played cards but once, and then he didn't know the cards one from the other, so we didn't play any more. I was present on an occasion when Mr. J. L. Niday attempted to procure the signature of Mr. Green to a document. It was the 7th day of March that Mr. Green became unconscious, you might say. He didn't know. And we sent for Mr. Niday, and he

came up, and he said, would he be able to ever sign his signature, would he ever be able to get his signature. But we tried to walk him around. He wanted us to walk him around and try to arouse him, but he wouldn't arouse. In the fall of 1915, along the latter part of the summer, and all after that, he would just wring his hands and say, "Oh, Carrie, I have ruined my family, I have ruined my family."

#### CROSS-EXAMINATION.

By MR. FRASER.

I did not understand what he meant by that statement; I never questioned him. When he made that statement I thought it might be in reference to the fact that his property was so involved that he had nothing left and that was what caused him to say that. After 1914 he would come home sometimes and tell me that he had got lost again. Mr. Green was eighty years old at that time. My mother was living with us at that time. I never knew of the two of them getting lost but once. The two were together and it was dark and they got off the wrong side of the street car and both got lost. The time we tried to get his signature was just a few days before his death. I do not know Mr. Satterfield personally. I know he was in town in Boise here at that time. I do not know whether or not the signature of Mr. Green required at that time

was in connection with some of Mr. Satterfield's affairs.

#### RE-DIRECT EXAMINATION.

By MR. MONTGOMERY.

Mrs. Niday said Mr. Satterfield would like to see Mr. Green and she told him he wouldn't know him, there would be no satisfaction in meeting him.

#### RE-CROSS EXAMINATION.

By MR. FRASER.

I say the time Mr. Satterfield wanted to see him was along close to the time they wanted to get his signature to a document, a few days after that.

HATTIE A. PHILLIPS, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

By MR. MONTGOMERY.

My name is Hattie A. Phillips. I was acquainted with Mr. R. E. Green in his lifetime. I first met him in 1915. He was my neighbor, lived just a block from me. He was my neighbor up to the time he died. During this time I saw him every day when I was home. I made observations in regard to his mental and physical condition. He acted queer and nervous and restless at all times. I carried on conversations with Mr. Green during that time. They were not in relation to his business. He didn't seem to be clear in his—He would start a conversation and then he would stop right in the



middle of a conversation. He didn't seem to be able to finish it, know what he was talking about. He knew, but wasn't able to finish. And Mrs. Wager used to visit my house every day. She wouldn't be there five minutes until Mr. Green would come down and ask childish, foolish questions, ask her when she was coming home, and was she going to stay long, and whether he should go here or there. He depended entirely upon her. I have seen Mr. Green in the presence of Mrs. Niday. He seemed to be afraid of Mrs. Niday and nervous. Whenever he knew she was coming he would pace the floor and wring his hands and at all times he seemed to be in fear of her. I lived at their house from April, 1916, till the 17th of December. I was there off and on and made it my home.

#### CROSS-EXAMINATION.

By MR. FRASER.

I did not see Mr. Green in 1917. I went to visit my daughter in Pocatello the 17th day of December, came back the 20th day of March, and Mr. Green had passed away. I talked with Mr. Green frequently. He would be sitting in his chair. I would ask him questions and talk to him and he would start to reply and just become nervous, begin to shake and wring his hands, didn't seem to know how to finish. That was the condition in 1916 and 1915. I didn't notice very much change in him. I was there frequently when Mr. Niday would call



on him, which was on an average of once or twice a week. Mrs. Niday would call on him almost every day. He went down to visit Mr. and Mrs. Niday frequently. He seemed to be afraid to go to their home. When he was told they were coming after him to take him down or that he had to go down there he would just begin and walk the floor, wringing his hands, act so nervous and worked-up; he didn't want to go. He never refused to go. They would take him in the automobile. Sometimes he went on the street car. Sometimes he went by himself. He was not afraid those times. He didn't seem to want to go. They would call up and I would hear the conversation over the phone. He would ask Aunt Carrie if it was time to go and should he go. He would go downtown, would start off and go downtown, come back and say he was lost, didn't know where he was, forgot which way to go to the car line.

MARGARET R. EGBERT, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

I reside at Nampa. Have lived there twenty years. Mr. R. E. Green was my brother-in-law. His wife was my sister. Following the death of my sister Mr. Green seemed crushed and broken, absent-minded, and uninterested in things. After

Mr. Green removed to Boise in the fall of 1914 I saw him possibly every two weeks. My mother lived there and I came over to visit them. During the years 1914 and '15 I had a talk with Mr. Green and he seemed so worried and crushed and I asked him what was the matter, and he said he was up against it, he didn't know where to turn, and I advised him to go to Mr. Niday. During 1915 I discussed with Mr. Niday Mr. Green's indebtedness and he said he couldn't understand Mr. Green, he was becoming so involved. During 1914 and 1915 Mr. Green failed right along. Every time I would make a visit to Boise I could see he was a failure and he realized his condition. There was a letter came from my sister, expressing her sympathy for Mr. Green, and I was reading it to my mother, I did not know he was hearing me, and he said, "Oh my, have you written anybody about my condition? It is bad enough to bear without anybody hearing of it." And we told him it was only his sickness we were referring to. One day Mr. Green was quite excited and I asked him what was the matter, and he said, "I have just written the meanest letter I have ever written," and he said, "It was to Harvey Moore," and I said, "What did you do that for," and he said Mr. Niday dictated the letter and he had to sign it.

## CROSS-EXAMINATION.

By MR. FRASER.

I think Mr. Green worried about his financial condition. I think his financial condition brought on the failure of his mind. He certainly realized that he was badly involved financially. He told me he didn't see how he could save Greenhurst, that everything was gone. He worried over those matters.

J. C. DEAN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## DIRECT EXAMINATION.

By MR. MONTGOMERY.

My name is J. C. Dean. I reside at Nampa. Have lived there since the fall of 1916. I rent from Mr. Niday the ranch known as Greenhurst, 212 acres known as the Greenhurst ranch, where the buildings are, and 111 acres across the road. I rented this land for the year 1917 and '18. I rented it from Mr. Niday on a 50-50 basis. Mr. Niday's share in 1917 was something like \$1400 and in 1918 it was eighteen or nineteen hundred.

## CROSS-EXAMINATION.

By MR. FRASER.

I did not pay the taxes on the property or the the water rates. Mr. Niday furnished the seed and furnished everything. I did the work. Mr. Niday

furnished the grass seed and wheat and the water, taxes, and all repairs.

H. G. PATTERSON, produced as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

My name is H. G. Patterson. I have resided in Boise nearly twenty-one years. Am a dentist. I was acquainted with R. E. Green during his lifetime. Knew him for a period of about thirteen years. I had an opportunity to observe Mr. Green's mental and physical condition during the years 1914 and 1915. Mr. Green was at my house and I was at his home. Sometimes it would be twice in a week and sometimes it might have been two or three weeks without being there. I believe about the first that I noticed was shortly after he had moved up to Boise. I noticed that he was not as I had noticed him before he came to Boise, and while he was on the ranch. He was not so talkative and seemed to sit around more, and either be thinking or didn't seem to talk very much. I remarked to my wife several times that I believed he was failing. He kept failing from time to time as I would see him until the time of his death. It was so noticeable to me that I made the remark to the wife; nearly every time we would see him I would say that Mr. Green is failing.



## CROSS-EXAMINATION.

By MR. FRASER.

He was failing physically and mentally. I base my opinion that he was failing mentally upon his actions, sitting and not conversing. When I would be there he would speak to me, and if I would sit and talk a little bit he would talk, but he would sit quiet, talking and sitting. The other indications which I noticed of his failing condition was he would get up and go from the room where he was and I would hear Mrs. Wager say, "Mr. Green, what are you looking for, what is the matter?" He would say, "I don't know." Then he would come back in where I was. The first time I noticed this I think was in the fall of 1914. Mr. Green was an elderly man at this time. I think I have seen other men of his age show the same indications that he did, of old age and senility, to just as great an extent as Mr. Green disclosed them. Some men of his age act very much as he has and some do not. Mr. Green, in other words, appeared to be an old an feeble man.

MRS. N. A. RATCLIFF, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

## DIRECT EXAMINATION.

By MR. MONTGOMERY.

My name is Mrs. N. A. Ratcliff. I reside in Nampa. Have resided there thirty years. During



my residence at Nampa I was acquainted with Mr. R. E. Green, deceased, very well acquainted, so much so that I would feel at liberty to go to their home and mingle with them at their family table just as I would with my family. I had an opportunity in the years 1914 and 1915 to observe Mr. Green's mental and physical condition. Before Mr. Green left Nampa we knew his mind was not as it had been. When I would meet him on the streets he never recognized me until I would speak, and I have spoken to him the second time and started a conversation before he would know who I was. That was before he left Nampa. That was very much in opposition to his general mental temperament in earlier life. After he moved to Boise in 1914 I visited at his home and stayed overnight at different times. I would notice that he was failing. During the years 1914 and 1915 I made visits perhaps two or three times a year. At these times one of the strongest impressions was that he could not carry on a conversation. He would forget what he was going to say. He would start up to say something, a sentence or two. Then he would quit, and get up and go from room to room. Formerly he was a man that would carry on a very lengthy conversation, he was always jovial, and speak of what was going on. The last I remember specially of, and the greatest, was the year that our soldier boys left for the war, 1917 or 1916. It was the

4th of July and I went there and stayed all night. There was quite a change since I had seen him before, he was so very nervous, he could not be still, and he would follow Mrs. Wager from room to room and try to carry on a conversation and tell her something, but he wasn't able to do it.

#### CROSS-EXAMINATION.

By MR. FRASER.

I was on the streets in Nampa at least once a week and if I met him he never recognized me, that is, within the last year before he moved to Boise. As I remember, he always did before. I did not see Mr. Green for some time after his illness in the hospital. I noticed quite a change in him after his illness and he failed rather fast after his illness, but he had failed for some time before he left Nampa. I suppose I have seen those changes in some people, but not people that was of normal mind. They would fail in age and become forgetful. I think a great many men and women become forgetful in their old age. His case was unusual as he could not recollect anything after the time he began to fail. It wasn't only forgetting. He would go from room to room and follow Mrs. Wager and try to ask questions and he couldn't complete the sentence. I do not know whether he followed anyone around when he was over at Nampa and before he moved to Boise. I saw him about twice a year after that.

J. A. GRAEF, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. MONTGOMERY.

I am the husband of Julia Graef, the plaintiff in this case. I conducted the negotiations which were had on behalf of Mrs. Graef with reference to the purchase of the claims of Gratia Green Acuff and Philo F. Green. In November, 1919, I received a letter from Mr. Philo Green, stating he was short of money, and he would rather sell his interest in the case if he knew of anyone who would buy it, he would rather settle with Mr. Niday as Mr. Niday had offered to settle with him before by a written proposition. I told him I would consider the matter and I would come through there and talk the matter over. I called upon Mrs. Gratia Acuff and told her what Mr. Philo Green stated, what he wanted. At the same time Mrs. Acuff said she would rather sell her claim, too, and just off-hand I said, "All right, I will take it for my wife," and I paid her immediately, wrote out a check as part payment of the agreement. The following day or two I visited with Philo Green and he broached the subject and I made the same proposition. I made the same part payment to him. As I had not sufficient funds with me at the time I made this payment to the statement here. Plaintiff's Exhibits

5 and 6 are the receipts issued at the time of these negotiations.

### CROSS-EXAMINATION.

By MR. FRASER.

I have had the direct control of this litigation since its commencement, for my wife. I had control of it when it was started in the district court of Canyon County, from that time to the present time. This two hundred dollars was not the full consideration for their claims. I have not as yet paid the balance of the consideration. It is not contingent upon the result of this litigation. I went down there and obligated myself to pay Mr. Philo Green and Mrs. Acuff the sum of \$3,000.00. After I purchased these claims I returned to Portland and told Mr. Montgomery what I had done. Prior to that Mr. Montgomery did not know anything about it. Mr. Montgomery then advised me to dismiss the suit. He did not give me any reason. Just told me to dismiss in the state court and commence one in this Court, and I followed his advice. I really know of no reason for dismissing the action in the state court. The only reason was the case was to be tried in Caldwell, the County where the property lay. Mr. Niday applied for a change of venue and the change of venue was granted, and it was to be tried in Boise here. I wanted it tried in Caldwell. I could not say what reason Mr. Niday would have for wanting to have it transferred to Boise. I



did not commence the negotiations to purchase these claims. I am to pay them \$1,300.00 more apiece. I probably could have paid them the whole amount in cash at that time if I wanted to.

#### RE-DIRECT EXAMINATION.

By MR. MONTGOMERY.

I purchased these claims on behalf of my wife. I had no interest in the litigation.

PHILO F. GREEN, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

By MR. MONTGOMERY.

I am one of the heirs-at-law of Mr. R. E. Green, deceased. Plaintiff's Exhibit No. 5 is a receipt issued by me to Mr. Graef. I have heard the testimony of Mr. Graef with reference to the transaction that took place between Mr. Graef and myself. I wrote to Mr. Graef in regard to needing some money and I received a reply from Mr. Graef, and he said he would see me at a future date, and he came to Jerome to see me. I would say it was a couple of months after I sent him the letter. Mr. Graef's statement of the contract between us is correct. I did not prior to the death of my father learn of the execution of the deeds given by my father to Mr. J. L. Niday.



## CROSS EXAMINATION.

By MR. FRASER.

Mr. Graef came to the office to see me. He knew what circumstances I was in and he gave me \$200.00 on account of my claim. He did not tell me he wanted to buy it. I told him first that I wanted to sell it before he mentioned it to me.

## THE PLAINTIFF RESTS.

J. L. NIDAY, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

## DIRECT EXAMINATION.

By MR. FRASER.

My name is J. L. Niday. I am one of the defendants in this action. I am the son-in-law of R. E. Green, deceased. My wife's name is Mollie A. Niday. I first became acquainted with Mr. Green in Boise about 1893 or '94. I knew him from that time until his death. He resided during this period of time in Boise and on a farm near Nampa, about seventeen or eighteen miles away. I have resided in Boise during all this period of time, engaged in practicing law. When I first know Mr. Green he was manager of the Ridenbaugh Canal and looking after the business of Satterfield and Taylor. They owned what was then the Boise City Irrigation, Land and Lumber Company, a large amount of land in Ada and Canyon counties, consisting of several thousand acres. Mr. Green managed the

Ridenbaugh canal, looked after the land of Taylor and Satterfield until about 1906 I think, when the canal was conveyed to the Nampa & Meridian Irrigation District. In the meantime both Taylor and Satterfield had died and Mr. Green had been appointed administrator of those two estates, and from that time on he spent most of his time in taking care of those, except when he was on the ranch looking after ranch matters. The matters Mr. Green looked after involved a considerable sum of money. Mr. Green was a good business man, a fine business man. He was highly educated. He was always alert, a man who devoted himself strictly to his business; was a great reader, a great buyer of magazines. He seldom let one pass that he did not purchase. He was quite a lover of art and had I think rather rare judgment in that line. He was by profession a civil engineer. Mr. Green during his residence in Idaho acquired a considerable amount of lands. They were situated mainly, if not entirely, in Canyon County. He acquired those lands probably along about 1898 or '99. He owned them from that time up to October 1, 1915. From the time I knew Mr. Green until 1909 I was practically in contact with him all the time during business hours. Our offices were right side by side. About 1900, or somewhere along about that time, he moved to Nampa, from that time on I did not see him so very often. I would

see him after he moved to Nampa probably once a week. He visited my home in Boise frequently, both he and Mrs. Green, after they moved to Nampa. After the death of Mrs. Green in 1909 I would probably see Mr. Green once or twice a week. After the death of Mrs. Green Mr. Green undoubtedly suffered physically, as any of the family naturally would, but mentally I noticed no difference in Mr. Green's mind from that time until the time he was sick in the early days of January, 1916. At that time he had what the doctor called every indication of pneumonia. That was in January, 1916. From that time there was a change in his mental condition, brought about by that sickness unquestionably. It was not serious only while he was sick, but after he had in a way recovered from that. There were times undoubtedly that he was excitable and showed every indication of being poisoned with autotoxic poisoning or something of that sort, bad digestion. He showed nervousness. I do not think there was any lapse of his memory. I do not think he was a man that would lose his memory more than would be expected in any man of his age. I talked to Mr. Green almost daily from 1916 to the time of his death. I had not the least difficulty in carrying on a conversation with him. He certainly understood everything that was said by me. Not only that, but he could argue out a point and do it as well as anyone could, and that was

even after his sickness. In 1914 I was acquainted with the lands Mr. Green owned at that time. I was familiar with Mr. Green's affairs at that time, in 1914. I think all of his property was encumbered, every bit of it, as I recall it. Greenhurst proper—when I speak of Greenhurst proper, I refer to the land in controversy in this action—Greenhurst proper had on it at this time a mortgage to Mr. Dewey of \$10,000.00 and accumulated interest. It had a second mortgage on the same property of \$1683.55, also in favor of Mr. Dewey. And at that time Mr. Green came over from Nampa to consult me. At the time he came over to consult me was possibly in July, but, if not, it was in September following, in 1914. I desire to state in a general way what became of all the property owned by Mr. Green. There was on the Dewey mortgage \$11,683.55 and accumulated interest and on the Volker mortgage there was when paid \$4,859.50, and on the Mullen mortgage when paid \$2,385.12, on the Hardiman mortgage \$3,292.00, and in addition to this he owed the First National Bank of Idaho on one note \$5,000.00 and accumulated interest and taxes amounting to \$5,612.20, and on unsecured notes with interest \$3,776.00, and on the Lewis mortgages, two of them, which had been given for unpaid labor accounts, \$3,461.96, and on the Templeton mortgage a total of \$3,000.00 and accumulated interest. I may say this totals upwards of \$40,000.00,



including the floating indebtedness he had at Nampa, as Mr. Green and I figured it up at that time. These matters were settled and adjusted in the following manner: Mr. Volkner had already instituted foreclosure proceedings. The First National Bank of Idaho had a lot of unsecured debts and the question came up as to what was going to be done with this property, and we called some of the creditors in, Mr. Green and I did, and discussed the matter together, and Mr. Green was of the opinion that there was absolutely nothing that he could do. It became necessary for the bank either to lose a large part of its indebtedness or to take up the other debts. We were at that time going to attempt to save what we called Greenhurst proper. The First National Bank agreed to take up all of these outstanding mortgages on everything else. This meeting that I speak of was in November, 1914, and as the matter was figured up, it would take something like \$19,000.00 to be raised to cover the other properties outside of Greenhurst proper. The \$19,000.00 was then secured to the First National Bank as follows: The 108 acres situated in Section 36, the 65 acres known as the Hastriter place, and the 80 acres known as the Ward place, were all deeded to Mr. Moore in payment of his debt. Mr. Moore furnished the money to pay off the mortgages on these lands and then he took a deed outright to the property, to the lands I have mentioned,



and that divested Mr. Green of title to those particular lands. Mr. Green made arrangements with Mr. Moore, who did not want the property at the time, that he might redeem it at any time within a year, and it was put in the contract, and Mr. Moore, acting on behalf of the bank, let it run another year still, giving Mr. Green an opportunity to redeem those lands for the amount due, and even suggested that he would knock off something. And then he did not do anything, even after that year had expired, until the spring of 1917, when I told Mr. Moore that I did not see any chance for Mr. Green to handle them and I would not ask him to wait any longer on him to do so. During those two years I tried to find a buyer for those lands so as to save any equity in them for Mr. Green. I was not able to find a purchaser for them. I have a copy of the agreement between Mr. Moore and Mr. Green. There were about 253 acres of land included in this Moore deal that were deeded to Mr. Moore in satisfaction of the debts against said lands. This still left Mr. Green a considerable number of acres of land, the 212 acres of Greenhurst, 40 acres on the south side of the O. S. L. R. R., and also city lots in Nampa with a house on them. After this deed had been given to Mr. Moore Mr. Green disposed of his other real estate. He conveyed to Mr. Charles Lewis those lots, with the house situated thereon, in what is known as Elm-

wood place, I believe, an addition to Nampa. The consideration was practically \$3,461.96. That was not paid to Mr. Green in cash. This was the amount that Mr. Green owed Mr. Lewis and he deeded him these lots in Elmwood place in payment of that indebtedness. Mr. Green did not receive a cent of money at that time. It just went to pay one of his debts. Mr. J. H. Templeton had two mortgages on forty acres or thereabouts lying south of the Oregon Short Line Railway Company in Section 36, 3, 2 W., and a settlement was made with Mr. Templeton whereby his two mortgages were paid by deeding that property to him without any consideration at all coming to Mr. Green other than the payment of the debt. The only other land left after these deeds had been executed by Mr. Green was the 212 acres known as Greenhurst, in Section 31. That was encumbered. That is the land in controversy in this action. Mr. Dewey held the mortgages on that land. About a year after these other transactions Mr. Green was in the office and he brought up the question about what was going to be done with Greenhurst and the payment of the mortgage which would come due the following January, and in the conversation he said, "Niday, you have been transacting the business of mine and my family here practically ever since you have been here and you have never been paid anything, and I would like for you to have Greenhurst

if you want it. I can't pay out on it, and it is of doubtful value even for you," and he expressed a doubt as to whether or not I should take it in view of the fact that he knew it was a losing proposition. I told him that I would consider the matter. Later on he came in and the matter came up again and I told him that I thought I could see my way clear to handle it and I hated to see it go for that amount of money, even though it was losing; that I hoped some time the conditions would change in real estate, and Mr. Green had to be supported, and some time maybe conditions would change so there could be something gotten out of it. I told him I would accept the deed; prepared the deed for him, subject to the mortgages that were against it; and he took the deed himself and went away to Miss Nellie Wood, and he had it acknowledged, and later brought it back to me. I did not induce or persuade him to sell or transfer this tract of land to me. I never approached him or asked him to deed that land to me. The proposition came from him absolutely. I had never considered the matter before he mentioned it; in fact, I didn't want Greenhurst place, never did want it. When it was offered to be conveyed to me I hesitated seriously before I would take it. There are about 105 acres actually in cultivation, about 40 acres in sagebrush. There is a tract south of the lane and the house, between them and the railroad, of about 70

acres, of which about 15 is in a proper state of cultivation. The balance is practically not in cultivation, though it has been cleared and is in a way irrigated, but it is so steep that it is almost impossible to irrigate it. It is ashy soil that dries out so quickly that you can't keep it wet long enough to produce anything. One hundred and five acres is practically all that is producing now. The 105 acres would be fine land were it not in danger of becoming alkalied and what they call water-logged. The water table is rising there and Greenhurst is threatened unquestionably, and seriously threatened. I have a tract of land lying about half a mile right down the creek from there that a few years ago there wasn't a better piece of land found anywhere. Today the land is so badly alkalied and the water level is so high in it that you don't dare to run anything heavy over it, like a threshing machine, because it will mire down, and it is getting so that it practically won't produce anything, and beyond question Greenhurst is threatened in the same way today. There are certainly indications of alkali on Greenhurst. There is alkali on the ranch itself, that is, on the cultivated part. There are numerous spots that are white even now, and as soon as the frost comes and freezing it will be a great deal worse. I paid these mortgages held by Mr. Dewey against Greenhurst. I paid him \$12,178.44. I have been engaged in



farming for a good many years in Ada and Canyon counties. I own irrigated lands in both those counties. I have kept posted as to the market value of farm lands in these counties. I am well acquainted with the ranch known as Greenhurst. I was well acquainted with its market value in 1915. In my opinion the reasonable market value of Greenhurst ranch in 1915 was \$15,000.00. That is more than it would show to be worth upon any known method of figuring out its productive value as it stands today or as it stood then. I do not know of any lands being sold around there in 1915 for more than that. The lands which were deeded to Mr. Moore or the best land that Mr. Green had, and the most valuable, was the land situated in Section 36, 108 acres lying across the road from what we call Greenhurst proper, and also the land conveyed to Templeton on the south side. The 108 acres across the road is the land that was conveyed to Mr. Moore. They are a great deal more valuable than the Greenhurst land, a great deal less waste, and greater productivity. From the time this land was deeded to Mr. Moore during 1915, '16, and somewhere along May or April, 1917, I tried to find a purchaser for it for Green for more than two years. I was not able to find a purchaser at all. The amount against this land was less than \$74.00 per acre and I was unable to find a purchaser for it. The land which was deeded to Mr. Templeton was a



good deal better land than Greenhurst and that was deeded in satisfaction of a deed of \$3,000.00 and interest. In 1915, after Mr. Green had executed this conveyance to me, he owned no property that I know of. He moved from Greenhurst in the early part of November, 1914. I would say that land situated around Greenhurst more than doubled in value between the year 1915 and the year 1918. No doubt the main reason for this was the war and the high price that farm products were bringing during the war. It gave an impetus to the valuation of real estate. I leased Greenhurst for the year 1916, '17, and '18, before I sold it. I have a statement of the expenses and income of the ranch during those years. The last year of Mr. Green's ownership of Greenhurst he leased the property to Mr. John Leash, that was in the year 1915, at a cash rental of \$1110. For that year the taxes were \$153.99, water toll and assessment \$303.99, repairs and incidentals a hundred dollars. I have not figured anything for overseeing the place or for the wear and tear on the house and fences. This refers exclusively to the 212 acres of Greenhurst. The let loss that year, figuring interest on the amount of money that I had paid on the place at eight per cent., the total loss was \$416.32. I mean the interest on the Dewey mortgage. For the year 1916 those premises were leased to John Clark and G. D. Fike on

a crop rental basis, for one-half the crop. The one-half crop rental for that year was \$1,020.74. That is the amount that came to me as owner of the land. The taxes for 1916 were \$142.84, the water taxes were \$324.97, incidentals \$18.70, and figuring one year's interest on the cost to me at eight per cent., \$968.34, making a loss of \$434.11, without figuring anything for overseeing or wear or tear. The next year was 1917. It was leased to J. C. Dean on a crop rental basis. I received that year for my share \$1255.00. The expenses were taxes \$185.78, water assessments \$503.98, and painting the house \$276.64. Figuring interest for one year on my investment at eight per cent., the loss was \$678.74, without figuring anything for overseeing, wear, or tear. In 1918 the premises were again leased to Mr. J. C. Dean on a crop rental. My share of the total income was \$1938.05. The expenses were taxes \$231.62, water assessments \$332.95, the incidentals were \$16.25. Interest on the amount of money I had in it, that is, the amount of the face of the mortgage, and other expenses paid, amount to \$968.34, making a total indebtedness or expense for that year of \$1749.16, showing a gain of \$188.89, without figuring anything for overseeing, wear or tear of the property. The deed to me from Mr. Green for the 206 acres was dated October 1, 1915. The second deed was for six acres and was dated December 22, 1914.

On these dates the mortgages to Mr. Dewey were existing liens against this property. They were to become due January 31, 1916, in about four months from the time I procured the deed. Mr. Dewey told Mr. Green when the mortgage had been renewed before that he must not ask for another renewal, it would have to be paid when due. Under date of January 7, 1916, Mr. Dewey wrote Mr. Green a letter, notifying him the date when the mortgages would become due. Mr. Green did not to my knowledge have any means or method of raising the money to pay off these mortgages. He said he had none, and I knew of none. All his other property had been disposed of at this time, and I know of no other resources that he had by which he could have paid off this mortgage. At the time Mr. Green came to me and suggested that he would deed the property to me he said if I didn't take the property Mr. Dewey would have to take it. I heard Mrs. Acuff testify that a short time before Mr. Green's death I went up to the house when he was practically unconscious and that I took him out of her arms and compelled him to sign some document or paper. As I stated before, Mr. Green had been administrator of the will of the Taylor and Satterfield estates for a great many years and he had a little balance of account there. It is now my memory that it was seven or eight hundred dollars in cash in the First National Bank

of Idaho. Mr. Satterfield was here and knew that Mr. Green was in a very bad state of health and could live but a very short time. He asked me to have that cash checked to my account so that if anything happened to Mr. Green the money would not be tied up, and I went up to see Mr. Green. He was sitting at a table, as I remember, at the time, doing something on a board. I spoke to him and he looked up and spoke to me in a quiet, low tone. I said, "Mr. Green, how are you feeling today?" and he said, "I am feeling pretty well." I came up there with a check for him to sign for the money in the bank standing in the name of R. E. Green, administrator. I do not remember the details of presenting that check, only I know this, that Mr. Green was not taken out of anybody's arms. I know that he was not coerced in any way, shape, or form to sign that check or any other check, and I know that Mr. Jack Green was the one that presented him the check to sign. I think the check can be found today, showing it has no marks of being done under force or coercion. That is absolutely false. I heard read into the record here a letter written by Mr. Green to the irrigation company in regard to an application for water to this land. I think in the spring of 1915 there was a controversy arose over the amount of that water that belonged to the tract of land that was deeded to J. H. Templeton, and that letter that was re-



ferred to was one that I had written to Mr. Moore, treasurer of the Nampa-Meridian Irrigation District, that it was not his business to decide upon what water was appurtenant to land or what was not, that that was a matter of contract between Mr. Green and his purchaser, Mr. Templeton. I am referring now to the letter that Mr. Green apologized to Mr. Moore for. That letter was written after I became the owner of Greenhurst. The transaction was done that way for the reason that the district at that time had no knowledge that Mr. Green had conveyed the property to me and I was putting it in a way that they would comprehend it, as it had always been before. An application had been made by Mr. Green for this water prior to that time and all negotiations in regard to it had been in the name of Mr. Green. After Mr. Green came to Boise to reside in 1914 I saw him very frequently, almost daily. He visited at my home very frequently after that time and he kept visiting at my home as long as he was able. He never showed any signs of being afraid of me or my wife, nor did he seem reluctant to go with me when I would go up after him. He sought me a great deal, came to my office almost daily after he was sick, and if I was busy would wait in the office until he could see me. Instead of shunning or being afraid of me, I think the exact reverse is true, and the same is true in regard to my wife. To say



that he was afraid of her is a slander and a vile accusation. My wife was devoted to her father at all times. I advanced money to Mr. Green after 1914 when he had deeded his property away. It covered a period of time from about June, 1915, to the time of his death. I advanced to Mr. Green in that way the total sum of \$2,808.77. It was used largely for living expenses, some little part of it for taxes, about \$484.17 for interest to Mr. Dewey. Most of it, however, was living expense. He had no independent income, only a small amount from Taylor and Satterfield estates. When he left Nampa to come to Boise in the fall of 1914 his household goods and furniture were mostly moved over here. There were some things sold at public auction. In 1914 a deed was made to me by Mr. Green for the tract of land of about six acres. When Mr. Green first came over here we found his property tied up in mortgages and the Volkmer mortgage was being foreclosed, and in the settlement with Mr. Moore for the First National Bank I arranged to have six acres that was included in the Volkmer mortgages released from the lien of the mortgages. This six acres was not deeded to Mr. Moore. When it was released clear and free of incumbrances Mr. Green said to me, "Niday, I probably will need all of this and more too for my living expenses; I would like to deed you this six acres and you can put up money for my use," which was done in that way.

That is the way the six acres came to be deeded to me. That was all that Mr. Green had left at that time and he had other debts outstanding. There was considerable indebtedness to the Bank of Nampa. When the money was paid in on the public auction that was held when the farm machinery was sold there was something like \$500 coming to Mr. Green. That money Mr. Green brought over with him to Boise. The deed given to me by Mr. Green to the 212 acres was placed on record I think about a year after I received it. It was put on record about a year before the death of Mr. Green. I had a reason for not putting it on record. In the first place there was nothing urgent about putting it of record. In the second place the real reason was that in order to pay off Mr. Dewey I knew I would have to borrow some money, and I asked Mr. Green if he would have any objections if he deeded it to me to making an application to the State Land Board for a loan of five thousand. That is the most money that any one person under the rules of the Land Board could get. I at that time had a five thousand loan on my Meridian place, so that I could not get it. He said he would be glad to do it and an application was made to the State Land Board for a loan of \$5,000.00 in the name of Mr. Green. I did not procure the loan from the state. They refused it. And then the deed was placed of record.

## CROSS-EXAMINATION.

By MR. MONTGOMERY.

Defendant's Exhibit No. 2, being the contract to Mr. Crawford Moore, it was not prepared by me. It was prepared by the firm of Cavanah & Blake, representing Mr. Moore or the First National Bank. I undoubtedly looked the matter over. This instrument provided for the payment of certain stipulated amounts in the event of the resale of the land, so that the price I was to obtain in my negotiations for a resale was fixed by the contract. Mr. Green, from his actions, must have had confidence in me, as he continued to come to me, and that continued during the years 1914 and 1915. I presume it would be said that I represented Mr. Green at a meeting in the fall of 1914 with reference to the settlement of his affairs. Those negotiations culminated in the execution of defendant's exhibit 2. I am inclined to think it was executed about the 11th of November, but I am not sure. After the execution of this agreement in November, 1914, Mr. Green did not continue to consult me regarding the condition of his affairs. There was not much to consult about. I do not recall of his consulting me about anything subsequent to that date. He came to me in the spring of 1915 to get me to write a letter for him to Mr. Moore. I wrote the letter for him and he signed it. I prepared the deed which Mr. Green executed to me and he went to Nellie

T. Wood and acknowledged it. She is the sister of Judge Fremont Wood, a stenographer here, and notary public. In the month of December, 1914, she was working for Judge Fremont Wood. They office on the sixth floor of the Overland building. I am on the third and she is on the sixth. Mr. Green had a great many attorneys act for him when he was administrator of the Satterfield estate. First he had W. E. Borah, next he had the firm of Wood & Wilson, and I am inclined to think that they continued as his attorneys for the balance of his administration so far as the Taylor and Satterfield estates were concerned, and yet during that time he occasionally would come to me with something. There is no doubt but that I appeared in the probate court for Mr. Green in the matter of the Satterfield estate. What I am saying is that I was not a regular attorney of the Taylor and Satterfield estates. I was on no salary and had no retainer. These appearances which I made in the years 1914 and 1915 came about in this way: Mr. Green had been for years selling real estate under the will without getting an order of court therefor or making return of sales, and finally Mr. Green came to me, asked me to make return of sales, or asked me what to do about it, and I told him I would advise making return of sales in bulk on all the stuff that was sold, which was done. I succeeded Mr. Green as administrator shortly after



his death, at the request of John M. Satterfield. I filed an answer in the District Court of the Seventh Judicial District for the County of Canyon, but I see nothing in that that I should retract.

Said instrument was thereupon introduced in evidence as

PLAINTIFF'S EXHIBIT NO. 9.

I have not at any time since this controversy has arisen expressed myself directly or indirectly in a way that would indicate that I felt this property was held in trust or that I should distribute any of the profits among the other heirs of Mr. Green. At the time of my conveyance of this property to the Defendant Buell I took back a mortgage upon the property.

Certified copy of said mortgage introduced in evidence as

PLAINTIFF'S EXHIBIT NO. 11.

In the Spring of 1915 two inches of water was diverted from Greenhurst ranch to other lands owned by me.

I filed an answer in the District Court of the Seventh Judicial District for the County of Canyon, reading, among other things, as follows:

"These defendants deny that said R. E. Green was greatly and largely influenced by the opinion and judgment of the said J. L. Niday, except upon occasions when the said R. E. Green consulted said J. L. Niday as attorney at law and requested his opinion upon matters of law."



CRAWFORD MOORE, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I reside in Boise, Idaho. Have lived here about forty years. I am engaged at the present time chiefly in the banking business. I am president of the First National Bank of Idaho. I was acquainted with Mr. R. E. Green in his lifetime. I knew him from my boyhood days up to his death. From 1909 until his death he was a customer of the bank. He did his banking business with the First National Bank of Idaho. I have met him quite often. Along in November, 1914, I had a transaction with Mr. Green in relation to the indebtedness he owed the bank. That is my signature on defendant's exhibit No. 2. This instrument is, as I remember it, an option given by myself to Mr. Green for the purchase of certain property lying near Nampa. We owned the property upon which I gave this option. We obtained it from Mr. Green by deed. That deed was executed as near as I can recollect in November, 1914. I had a talk with Mr. Green in regard to this matter prior to his executing the deed to me, on several occasions. I did not notice any difference in his mental capacity and attitude from what it had been before. He was becoming an old man at the time

he executed this contract, I would judge a man of seventy or seventy-five years old. I think he thoroughly understood the nature of the transaction. He went over it with me in an intelligent way and discussed it in many of the different phases, and at that time I certainly believed that he was in the full possession of his mental faculties, sufficient to transact business, with an absolute knowledge of what he was doing. The consideration to Mr. Green for the land covered by this option was \$18,851.53. The amount of land covered by that indebtedness was a little less than three hundred acres. We do not own the land now. We sold it about 1917, I think. We sold it on the basis of the amount that we had paid for the property, plus the interest, less what we had received in return, and we threw off from that amount a thousand dollars to clean up the transaction. We threw off a thousand dollars less than what was due us under the terms of the instrument. I own lands in Idaho, several hundred acres. Have owned lands here for twenty or thirty years, irrigated farms. I am somewhat acquainted with the values of land in the vicinity of Greenhurst in the year 1915. I am acquainted with what is now known as the home place, Greenhurst, of 212 acres. I have been over the land and was reasonably familiar with it at the time of this transaction in 1914. It would be hard to place a definite value on that 212 acres in 1915. I would say

those lands were worth perhaps seventy-five or eighty dollars an acre. That is probably somewhere near the value. In my opinion the increase in the value of lands such as the Greenhurst ranch between the year 1915 and May, 1918, was from two to three times its value in 1914.

#### CROSS-EXAMINATION.

By MR. MONTGOMERY.

I am familiar with a concern known as the Dewey Investment Company. I have had experience in making loans on farm land since 1914. A loan should be made on the basis of perhaps fifty per cent. of its value. The Dewey Investment Company enjoys a reputation of being safe investor. I would not think they had made an unsafe investment in loaning ten thousand upon the ranch called Greenhurst prior to 1914. A loan of \$10,000.00 made upon Greenhurst ranch in 1912 I would say was a safe loan. At the time of the consummation of the transaction which culminated in the instrument marked Defendant's Exhibit No. 2 Mr. Niday represented or accompanied Mr. Green. Mr. Blake was our attorney at the time.

#### RE-DIRECT EXAMINATION.

By MR. FRASER.

One hundred and six acres of the land which I received the deed for from Mr. Green, and which originally came off the Greenhurst place, I think is the choicest piece of the Greenhurst farm, and I

consider it so to this day. There were no buildings on the place we took. There were buildings on Greenhurst farm. I am not able to estimate their value. Many of the buildings were not what you would call good farm buildings. I think there was a fair house on the land. I think the water rights were the same upon all the land. All of it was Ridenbaugh water on the piece we took. I do not know what the water right on the other was. I made numerous efforts to sell this land prior to the time I sold it in 1917. At the time I got it I placed it in the hands of real estate agents for sale. I do not remember at what price, but we were trying to get out the money we had in the property. These real state men tried to sell it for a period of a few months. Mr. Niday during the time had been making an effort to sell it. We never found an actual purchaser. Mr. Niday did not purchase back from me any of the land included in Defendant's Exhibit No. 2.

J. J. WALLING, produced as a witness on behalf of defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

My name is J. J. Walling. Reside at Nampa, Idaho. Have resided there about thirty-four years. I am in the real estate business. Have been in that business eighteen years. Engaged in buying and



selling irrigated farm lands. I am acquainted with the tract of land of 212 acres known as Greenhurst. I have been upon the property many times. I was acquainted with the market value of lands in the vicinity of Greenhurst in 1915. In my opinion the value of that 212 acres known as Greenhurst ranch in the year 1915 was from fifteen to sixteen thousand. I would think that was the limit of its value. As I look at it, the 212 acres, there is about ninety acres good land. The land on the north and east is undesirable. The land south of the house is rolling; never showed a good crop. The land north of the driveway entering the place from the west is a nice tract of ground and I should judge fifteen acres or thereabouts on the south side of the driveway is a very nice tract of land. Mr. Major and I owned the place on the west of it. We bought that from Scott Anderson. We disposed of it. We were afraid of the drainage situation. When we found out Indian creek was not to be dredged out we wanted to dispose of it and we did. We took a \$1,500.00 profit and stood aside. The drainage affects the land as it shows alkali. It shows alkali at the present time on the east side of the drive way of the tract and on the westside of the 212-acre tract. In my opinion the value of such lands as Greenhurst and other irrigated lands



in that vicinity doubled in value from the year 1915 to May, 1918. I know of a great many places that sold at double the value.

### CROSS-EXAMINATION.

By MR. MONTGOMERY.

Alkali showed up first, as I recall it, about a year prior to the time we bought that tract west, but it only showed on the northeast corner, just a small corner next to the creek at that time, that is, the 108 acres on the west side of the road, not the 212. We knew that when we bought it, but the report that the Government would dredge the creek made us think they would reclaim it, but instead of getting better it was getting worse continuously. The Greenhurst ranch was always considered a good place, but what I have in mind the best part of the farm was the 108 acres. I think that was conceded by all the farmers and neighbors in that district. The 108 acres was not included in this 212 acres. There was the 108 acres more at the time Mrs. Green operated it. In 1914, '15, and and probably 1916 there was no demand for land. Most of the sales or transfers went through the sheriff's office during that period. There wasn't much sale, mostly foreclosures. Then in 1917 to the fall of 1918 showed the best increase in land in that vicinity. I would say the largest increase in the value of land was in 1918. I bought this land, as I recall, November or December, 1917, held it

until July, 1918, paid about 17,000 for it, sold it at 19,000, and we had to pay interest and pay for the labor and some fencing. We sold it for so small a margin because we were afraid of the seepage. I don't mean that this tract of land involved in this case necessarily doubled in value.

C. A. GLOUGIE, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

My name is C. A. Glougie. Reside at Nampa, Idaho. I am engaged in the real estate. I am acquainted with the ranch near Nampa known as the Greenhurst ranch. I have been on the property. I am acquainted with the market value of lands in that vicinity. In my opinion the market value of Greenhurst ranch, 212 acres, say in the year 1915 I would say not to exceed \$20,000, if that; \$15,000 would have been more than I would have given for it. Would have been more than I would be willing to have paid for it. The value of lands in that vicinity increased between 1915 and 1918 in value. The extent of the increase might be a little difficult question to answer. The good lands, the desirable pieces of property, have increased easily three-fold, where others have not increased that much. I consider a part of Greenhurst desirable land. When I looked over the

Greenhurst ranch with the intention of buying it I figured perhaps one-half the land was all I cared to look at at all, and I did not consider the balance. About half of it was reasonably good land. The balance of it I did not consider of any value.

#### CROSS-EXAMINATION.

By MR. MONTGOMERY.

I looked at it with the purpose of buying it in the latter part of July or the first of August, 1917.

SCOTT ANDERSON, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

By MR. FRASER.

My name is Scott Anderson. I reside in Boise. Have lived in Idaho about nineteen years. Am engaged in farming, real estate and livestock. I am somewhat extensively engaged in farming. We have somewhere in the neighborhood of 2,000 acres of farm lands. Possibly 4,000 acres of grazing lands. I have bought and sold farm lands between the years 1915 and 1918. I am familiar with the prices of farm lands in Ada and Canyon counties in the vicinity of Nampa during those years. I am acquainted with the tract of land known as Greenhurst, containing 212 acres. I have seen the property. In my opinion the reasonable value of that land in the year 1915 would be around twelve to fourteen thousand dollars. I think lands have

increased in value in that vicinity between 1915 and '18. I would say the good lands ,the good productive lands, have increased double. Other lands have not. I purchased a part of what was the old Greenhurst ranch, 306 and a fraction acres. Out of the 306 acres I would say that one tract of 107 acres, or approximately that, had considerably more value than the 212-acre Greenhurst ranch. It was better soil, the location was better, and more productive. I purchased these 300 acres of the old Greenhurst ranch some time in November, 1917. I figured the land on a basis of about seventy dollars an acre. That was the entire tract.

#### CROSS-EXAMINATION.

By MR. MONTGOMERY.

Q. You got a very good bargain, did you not?

A. Yes, sir.

I sold one tract to Mr. Walling. That was 108 acres or 107 and a fraction. I held it possibly sixty or ninety days and sold it for \$17,000.

#### RE-DIRECT EXAMINATION.

By MR. FRASER.

The time I sold it was about the time the big increase in land commenced. Land was increasing and I sold the land on very reasonable terms, six per cent. interest and a period of several years to pay for it.

JOHN M. GREEN, heretofore produced as a witness on behalf of the plaintiff, having been first



duly sworn, being recalled on behalf of the defendants, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I am the son of R. E. Green. I was present in the court room when Mrs. Acuff testified in regard to an incident that took place just prior to my father's death, where Mr. Niday came out to the house and coerced him to sign some document. I was in the room and present at the time. Mr. Niday brought in a check there which I understood to be a check for \$700.00, Taylor and Satterfield check, that was to be signed by my father so that Taylor and Satterfield could get their money out of the bank without any trouble. Mr. Niday stood at one end of the table and I asked him for the check and I took the check and I says, "Father, here is a check to sign, for \$700.00, Taylor and Satterfield estate money," and he signed it. I think he realized what he was signing when he signed it. Mr. Niday did not take my father out of the arms of Mrs. Acuff at that time. My father did not walk over to the table where the check was to sign it. I gave him a pen and he just leaned over and signed his name, just as good at that time as he ever signed his name before.

J. C. DEAN, heretofore produced as a witness on behalf of the plaintiff, being first duly sworn, be-



ing recalled on behalf of the defendants, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I am fifty years of age. A am engaged in the business of farming. I am acquainted with what is known as the Greenhurst ranch near Nampa, 212 acres. I have been over I think practically every foot of the land. I lived there and farmed it for two years under a lease from Mr. Niday, the years 1917 and 1918. There was not much value in land in that vicinity at that time. There was not any land selling in that neighborhood up till about the latter part of 1917. I never valued the Greenhurst ranch of 212 acres in the year 1915 from a productive standpoint at over \$14,000.00. There has been an increase in the value of such lands between the years 1915 and the spring of 1918. I know good land there that has increased three or four times, and I know some lands that has not increased but very little. There was about one-half of the Greenhurst ranch that was not worth cultivating. I tried to cultivate part of it. I did not make expenses out of it, and Mr. Niday furnished the water and furnished the grass seed. I did not get enough crop off of it to pay the help for irrigating it. The bottom land of Greenhurst compared favorably with other land between Nampa and Meridian. There was several spots of alkali

on the lower part of this Greenhurst ranch along Indian creek. I noticed that these alkali spots were getting more prominent and the alkali is increasing. The land on the Indian creek bottom I consider the best part of the Greenhurst ranch.

#### CROSS-EXAMINATION.

By MR. MONTGOMERY.

At the time I was on the ranch I discussed with Mr. Niday the question of the alkali on the land. Mr. Niday knew at that time there was alkali on the land.

J. L. NIDAY, heretofore produced as a witness on behalf of the defendants, having been first duly sworn, being recalled, testified as follows:

#### DIRECT EXAMINATION.

I had been occasionally consulted as an attorney by Mr. Green since 1896 and from that on up to the time he disposed of his property, the year 1914 and 1915. I should consider the reasonable value of my services to Mr. Green as an attorney-at-law during that period of time three or four thousand dollars would be very reasonable. I never presented a bill to Mr. Green for my services. He was the one that brought up the subject in regard to the payment of it. He made the statement to me when he brought it up that if he gave me everything he had in the world it would be very poor pay for what I had done for him, and that was the reason for his executing this deed. I am well

acquainted with Greenhurst ranch. The house on it was built about 1899 or 1900. It is a frame house without foundation. It stands on timbers, in some places 2x4, in other places 2x6, without any other foundation. It is merely boarded in between. The floors are badly settling and are out of level. When it was constructed it was constructed out of old timber and old houses pushed together, and while in a way it is a comfortable house, it is not of great value, it is of very little value. It is a story and a half. Eleven or twelve rooms scattered over a lot of ground. It is in a bad state of preservation and was when I got it. The outbuildings are of very poor quality. The water rights of Greenhurst ranch is what is called at the time I got it a Ridenbaugh right.

#### CROSS-EXAMINATION.

By MR. MONTGOMERY.

I never made up an itemized statement of my services rendered to Mr. Green. He merely proposed to convey that property to me in payment of it. It was just an off-hand statement.

MOLLIE GREEN NIDAY, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

By MR. FRASER.

I reside in Boise. Have lived here ever since I was married, about nineteen years. I am the

daughter of R. E. Green, deceased. My father lived at Greenhurst after the death of my mother until 1914. I saw him frequently during that period of time. I saw my father on an average of every week or so. He would either be over in Boise or I would be home. He came to Boise frequently during that period of time. He always visited at my home. After he came to Boise in 1914 until the time of his death I saw him frequently, every day or so. He would come down to the house whenever he wanted to, and I would go out there whenever I wanted to. We were back and forth. From 1909 up until 1914, when he came to Boise, I did not notice any signs of mental decay in my father. He was able to converse intelligently upon all subjects as formerly. The first time I noticed any failure of the mental faculties of my father was after he was ill in January, 1916. I saw him frequently after 1916 until the time of his death. He visited frequently at my home as long as he was able, and when he couldn't walk I would go over in the car. He quit coming down to my home a short time prior to his death in 1917. My father was sick about two weeks and up to about two weeks before his death he was a frequent visitor at my home. He came down and visited my home without any invitation from me or without any solicitation upon my part. At these times I never noticed any indication that he was afraid of myself or Mr. Niday.



So far as I could see from his actions and his demeanor he was willing to be in my company and society and that it was a pleasure for him to be with me. I took an interest in his welfare the last months and years of his life until he passed away. My father never talked to me anything about transferring Greenhurst ranch to Mr. Niday. I did not know that he had made the transfer until after the deed was made. I did not discuss the matter with my father prior to the time Mr. Niday got the property. He never at any time suggested deeding this property to me. I never at any time suggested deeding this property to me. I never made the statement in the presence of my sister, Mrs. Acuff, that my father was crazy. I never considered my father crazy. After he was sick he would have spells that he was very nervous and excitable, but if you would talk slow to him he would understand what you said and he would talk to you. He knew what he was doing practically up to the time of his death. I never made the statement in the presence of Mrs. Acuff that I thought my father was a little off. I didn't consider he was off. In 1915 I think my father was able intelligently to make a conveyance of his property, knowing what he was doing and the value of what he was conveying, and he drew his own checks at that time.



## CROSS-EXAMINATION.

By MR. MONTGOMERY.

Mr. Green I think drew these checks at home. I do not think I knew of the execution of the deeds until after my father's death. I absolutely knew nothing of them until after they were made.

MISS NELLIE WOOD, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

## DIRECT EXAMINATION.

By MR. FRASER:

I reside in Boise. I have resided here since 1890. I am a notary public and was a notary public in the years 1914 and 1915. I was acquainted with R. E. Green in his lifetime. I became acquainted with Mr. Green shortly after he came here. I knew him from that time on until the time of his death. Along in 1915 I did not see him so often, but while he was in Boise in charge of the ditch work I saw him nearly every day for more than ten years. I have visited at the home of Mr. and Mrs. Green while they lived here in Boise. This deed dated the first day of October, 1915, from R. E. Green, widower, to J. L. Niday, conveying what we call the Greenhurst ranch, containing 206 acres, contains Mr. Green's signature, and that is my signature as a witness to his signature. He certainly must have signed it in my presence. I took the acknowledgement to it. Mr. Green appeared before me at that time to have the acknowledgement taken. I re-

member the incident of his coming up and bringing that deed for execution. He was there in the evening and Mr. Wood was there and we had quite a talk with Mr. Green at the time he executed this instrument. At that time I saw nothing to indicate that he was mentally failing. He appeared to be the same as he had been on numerous other occasions. He appeared as he had always appeared when he came to execute an instrument. I had taken his acknowledgement many different times. We visited for some time after I had taken this acknowledgment. He seemed perfectly normal. It had been quite a long time since I had seen him to talk to him and we had quite a visit. Mr. Wood, my brother, Mr. Green, and myself were the only ones present. After he acknowledged it he took the deed and left the office. That is Mr. Green's signature to this other deed dated the 22d day of December, 1914, executed by Mr. Green to Mr. Niday and containing six acres of land more or less. I also signed that deed as witness to his signature. I took Mr. Green's acknowledgment to that instrument on the day it purports to be. I do not remember of Mr. Niday ever being in the office with Mr. Green when any instrument outside of the estate matters that he used to be administrator of were executed. At the time of the execution of this instrument I did not notice any difference mentally in Mr. Green from

what he had been at prior times when I saw a conversed with him.

The original deeds above testified to by the witness as having been executed by Mr. Green in her presence were introduced in evidence and marked

PLAINTIFF'S EXHIBITS Nos. 1 and 2.

### CROSS-EXAMINATION.

By R. MONTGOMERY.

I do not think Mr. Niday was present on either of these occasions. One of them was executed just about closing time, along between five and six probably. I do not remember the time of the other.

MRS. MARGARET BOWERS, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

### DIRECT EXAMINATION.

By MR. FRASER.

I reside in Boise. Have lived here over thirty years. I was very well acquainted with Mr. R. E. Green from the time he came to Boise. I saw him very frequently. The first two or three years he lived in Boise he was a near neighbor. I saw him almost daily. I saw Mr. Green frequently after he moved over to what is known as Greenhurst, often at his office and often in my home. After he came back to Boise, in the fall of 1914, I saw him quite frequently. During the year 1914 I remember of his being in my home a time or two, and I met him frequently at Mr. Niday's home. I have talked with

Mr. Green a great deal. He was a man that had very sound judgment in business affairs, but he was a man that took a great interest in art and in books generally. In the years 1914 and 1915, during the times that I saw and talked with Mr. Green, I did not notice that he was failing mentally to any great extent, always alert, very alert in talking. I noticed that Mr. Green began to fail mentally after he had a spell of pneumonia, in January I think it was, 1916. From that time I never saw him so often, but I never saw him at any time but what he would answer all questions and seem alert until just a few days before he died. I had charge of the art exhibit at the state fair in 1915 and that fair was held from the 4th to the 8th day of October, 1915. A day or two before the fair opened I wanted Mrs. Niday to assist me at the grounds a little. We drove down to her house and Mr. Green was out on the tennis court with the children. My husband called to him and he came out and got into the car and went out with us, and discussed all works of art as intelligently as he ever had, enough so that it attracted the attention of several of the artists there. Mr. Green was looking at two pictures a long time, examining them, and then said, "There is a mistake there; that person never painted those two pictures," and he explained why, but I am not enough of an artist to go into that. I met Mr. Green very frequently after he came to



Boise in 1914. I think Mrs. Niday was always kind and thoughtful of him. I never heard her speak disrespectfully in any way to her father, her mother, or to her grandmother. I was at Mr. and Mrs. Niday's home on Christmas of 1915. I was there and spent the afternoon and had dinner with them. Mr. Green was there all afternoon. I talked with him a great deal that afternoon, and I remember his conversation was largely on the school question, and he went back to the days when he was teaching in New York, and then books and everything else that he usually talked about. I did not notice any handicap or have any reason to believe at that time from my talk with him that he was not in full possession of his mental faculties.

DR. L. C. BOWERS, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I reside in Boise. Have lived here since 1890. I was acquainted with R. E. Green in his lifetime. I knew him from 1896 up until the time of his death. My relationship with him was both social and that of patient and doctor. For a number of years I was the family physician. I have visited at his home and he visited at mine. I saw him frequently from 1914 to the time of his death. I was called to visit Mr. Green professionally in January,



1916. I found he had acute lobar pneumonia. In my visits with Mr. Green in my conversations with him during the years 1914 and '15 I always found him normal. I did not notice that he was declining mentally or was different from what he had been. He appeared as normal to me as he had been before. I did notice a mental decline in Mr. Green following his pneumonia in 1916. I noticed he was more reticent, less social, quieter. He was troubled with a physical defect which seemed to worry him more than previously. In the years from 1916 until shortly before his death when I talked to him he understood what I was talking about perfectly. In my opinion he was capable of transacting business even after he had pneumonia. I believe he would know what he was doing and the nature of the act. I was at Mr. and Mrs. Niday's on Christmas day, 1915. Mr. Green was there. I had a talk with him at that time. I did not notice at that time any failure of his mental faculties. He appeared to me at that time the same as he had years before, in splendid spirits that day.

#### CROSS-EXAMINATION.

By MR. MONTGOMERY.

If Mr. Green was suffering from any mental worries that day he did not make them known to me. Mr. Green's daughter Gratia called on me in regard to his condition. The subject was the matter of his illness. I tried to impress her that he

was seriously ill. In 1916 I made the diagnosis of pneumonia. I do not recall my conversation with Gratia at that time, only to that extent. I do not remember that I advised her as to his mental condition. He was delirious much of the time, as we were in pneumonia. The delirious condition in which I found him was produced by the pneumonia.

ELIZABETH LORE, produced as a witness on behalf of the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. FRASER.

I reside in Boise. I was acquainted with Mr. R. E. Green in his lifetime. I first became acquainted with him probably fifteen years ago. He was at Nampa, Greenhurst. I was living at Nampa then. I visited his home at Greenhurst. I became very well acquainted with him and his family. I remember when he left Nampa and came over to Boise. I saw him very often after he came to Boise. I saw him in the years 1914 and 1915 nearly every week. I stayed out there once in a while at nights with them and saw them very often. I always conversed with Mr. Green upon these occasions. I did not notice any signs of mental decay in Mr. Green in 1914 and 1915. He could converse with me as intelligently, the same as he had always done before. I did not notice any difference in his demeanor or actions in 1914 and 1915 from

what they had been when I knew him on the ranch. He was always just the same. I saw Mrs. Niday out there very often. I saw her and her father together frequently. She was always very sweet to her father when I have been around. Her father did not show any signs of aversion to her or being afraid of her. They seemed to be very companionable. She was very kind to him, took him out riding, took him to picture shows and the grand opera. I thought she was very kind to him.

#### CROSS-EXAMINATION.

By MR. MONTGOMERY.

Between November, 1914, and May I was a visitor at Mr. Green's home in Boise. Mrs. Wager was taking care of him at that time. I visited there every week or so or maybe twice a week. Sometimes I stayed all night. These visits were confined to a period between November, 1914, and May, 1915. I saw him after that, not very often. We were there to dinner in the fall of 1915. He served at the table and he was very nice.

J. L. NIDAY, heretofore produced as a witness on behalf of the defendants, having been duly sworn, being recalled, testified as follows:

#### DIRECT EXAMINATION.

By MR. FRASER.

I had a talk with Mr. Philo Green in regard to the execution of this deed made by his father and delivered to me. This conversation was, I think,

the next day after Mr. Green's funeral. Gratia Acuff asked me if we could not have a meeting at my office and talk over Mr. Green's affairs. I told her I would be glad to, and we met there. There was at that meeting Gratia, Philo and George L., and I think Mrs. Niday and myself. After discussing various things concerning the estate and the indebtedness and so forth, Philo asked to see the deed that his father had given me. I went to the safe and got out the deed. He examined the signature and he said, "That is father's signature and that settles it with me," and he handed the deed back to me. There were present at that time Mrs. Acuff, George L. Green, Philo Green, Mrs. Niday, and myself. I think this was the day after Mr. Green's funeral.

GRATIA K. ACUFF, a witness heretofore produced on behalf of the plaintiff, having been duly sworn, being recalled in rebuttal, testified as follows:

#### DIRECT EXAMINATION.

BY MR. MONTGOMERY.

I recall paying a visit to Dr. Bowers with reference to my father's condition. That visit was while he was so bad at the last of his illness. It was while my father was in such a troubled condition that it was almost impossible to hold him. My brother Jack was taking the burden of the care of him. This conversation with the doctor was a



couple of weeks before father died. Dr. Bowers and I had a long talk and we talked, among other things, of mental pauses. I was absolutely certain in my own mind that there was nothing physically wrong with my father during those years previous to his last hard illness. Well, maybe the last two or three years. Dr. Bowers explained to me in detail mental deterioration and he said that it had been coming on for a good many years, that he could not help it and could do nothing. I also discussed with Mrs. Lore the subject of my father's condition. At various times Mrs. Lore offered her sympathy to me, and talked of various ones in the family, of father's physical condition. This was during the last year before his death. She expressed sympathy, thought it was too bad about Mr. Green's condition, and the thing she deplored was his mental condition.

ELIZABETH LORE, heretofore produced as a witness on behalf of the defendants, having been duly sworn, recalled in surrebuttal, testified as follows:

#### DIRECT EXAMINATION.

By MR. FRASER.

I do not remember having any conversation with Mrs. Acuff in which I sympathized with her on account of her father's mental condition. I may



have sympathized with her over his illness. I was never there when Mr. Green was real sick.

DEFENDANTS REST.

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PLAINTIFF'S EXHIBITS.

No. 1.

Being a deed from R. E. Green, widower, of Boise, Idaho, party of the first part, to J. L. Niday, of Boise, Idaho, party of the second part, consideration \$1.00; conveying that part of the northeast quarter of the northwest quarter of Section 6 in Township 2 North, Range 1 West, Boise Meridian, lying north and east of the right-of-way of the Oregon Short Line Railway Company, containing six acres more or less, said deed being dated the 22d day of December, 1914; acknowledged before Nellie T. Wood, notary public.

No. 2.

Being warranty deed dated the 1st day of October, 1915, between R. E. Green, widower, of Boise, Ada County, Idaho, grantor, to J. L. Niday, of Boise, Idaho, grantee; consideration \$1.00 and other valuable considerations; conveying to said J. L. Niday the southeast quarter of the northwest quarter and lots numbered 2 and 3 and all that part of lot numbered 4 lying north and east of the right-of-way of the Oregon Short Line Railway Company and the east half of the southeast quarter, except three acres thereof, all in Section 31,

Township 3 North, Range 1 West, Boise Meridian, containing 206 acres, more or less, together with water rights thereunto belonging or in any wise appertaining. Said deed contains the following clause: "The conveyance of the above described property is made subject to a certain mortgage for \$10,000.00 made in favor of E. H. Dewey, trustee, recorded in book 48 of Mortgages, at page 81, also subject to a certain mortgage for \$1,683.85 in favor of E. H. Dewey, trustee, recorded in book 59 of Mortgages, at page 89, of the records of Canyon County, which said mortgages said second party assumes and agrees to pay. Said deed being acknowledged before Nellie T. Wood, notary public, and recorded the 27th day of May, 1916, in the office of the Auditor and Recorder of Canyon County, Idaho, and recorded in Book 74 of Deeds, at page 252 thereof.

No. 3.

"June 4/18

"Dear Jule & all:—

"This has been a very hot day. We rented the house where Father's things were stored and we had to move them again. This makes four times. Help is out of the question here, so it is do it yourself. Niday sits here and after reading your letter thought we would write tonight. Am so busy with Red Cross during the day hardly have time to cook meals.

“Now Jule when Father found he could not save his property he came to Mr. N—and said he wanted him to take Greenhurst, if he thought he could save it, and you will remember that Niday asked Joe if he could contribute toward saving it, and take a proportionate interest & stated to him that if we could hold on long enough real estate would come back and you remember at that time farm as well as city property was but little in demand—in fact, no purchasers for it, but Joe said he simply could not; he did not have the money and it was either Niday or Dewey as Dewey was going to foreclose. Niday also suggested this to the rest of the children with the possible exception of Dr. Philo. The boys could not take it so we raised the money at a time when Dewey was afraid he would have to take it and took a big chance as we well knew it would have to be carried at a big loss each year we held it and that we could only hope to make up in an event of sale.

“When we took Greenhurst it was certainly in bad shape and it has been a big expense to get it in good condition, and it was more sentiment than anything else.

“When Niday started to settle things Father was over \$40,000 in debt, and if it had not been for Niday working his head nearly off everything would have been wiped out, even Father’s personal effects, which we had to protect. The state lands and Ward

place went to Moore. Templeton mortgage took the land across from Stephenson's place. Charlie Lewis mortgage took house Jim lived in and we were fortunate to settle that way, so that left only the home place east of the N. & S. road some of it still in sage brush at least 40 A and the land between the house & R. R. in such shape nothing could be raised on it. When Father came to Boise he had \$500 which was put in certificates \$100 each and was used in paying a/ his debts personal expense as long as it lasted which was not long.

2.

This was all by check and I have the record.

"Father was over \$1000 in debt when he came to Boise it just seemed as if every one had an a/c against him. Nampa Dept a large a/c Hardware, Drugs, Meat, etc., but all were paid in full. It seems strange to us at this time something like 4 yrs after Father deeded this property that such a furor should be raised about this business when not a word said during the time Father was here being cared for all of this known during that time the deed having been put of public record.

"Jule I asked Father what he wanted done with "Falconers" and he said I want you to have it, Jule has the brackets and they came from the Centennial, and he wanted Gratia to have a picture, but she did not seem to want one, Jim knew this and said he told you or Joe, when he was there.



“There was an effort made to distribute pictures and things to those who wanted them and if we have any more it was because we thought they should bring more than was bid on them, same with some of the other traps.

“One of the great thorns in the flesh here is the piano deal which you know Father gave Jim and was in accord with your wishes and how hard I tried to get it moved before Father’s death.

“Now Jule there is no need of any trouble over this, and after Father’s death every thing was gone over in detail with all that were here and I told you about it last summer.

“It has been a puzzle to know what to do with things left and have thought best to send another notice to all and sell things so no one can say anything was done they did not know about. Will send statement of things you bought and receipts.

“I have not rec. the last bill from Standard for sending bronze yet, and Jim will settle the money as everything is paid Admr. he has charge of every thing.

“Now Jule everything was known and when the brothers & sisters was in Niday’s office after Father passed away all the papers were gone over and at that time Niday showed them the deed and Gratia & Dr. said if after the bills were paid if anything was coming to any one they wanted their share give to Aunt Carrie and that compelled the



expense of having it probated as no one had any right to do a thing but an Admr. and Jim made out the inventory & has handled everything. We have been looking for Joe. Jim said he was coming this way. Now Jule if there is any thing more you want to know just write us and it can be explained.

3.

"I took Jim and family and K. & M. and we went to the cemetery decoration day we had very beautiful flowers and the lot looked the best I have seen it, a new man.

"Don't talk to me about renting houses. We spend a year's rent getting these ready and then every tenant wants more. Niday sits here helping write this, did not want to wait until I answered. When N—comes he will go over anything with you you do not understand. No there is no occasion to have any misunderstanding about a thing.

"Yes Jule I will be glad when this is all closed up. No one has had the hard work & worry like I have and if I felt like myself I would not mind it, the thing that gets me is my knees ache so I can not sleep. Dr. here wants me to go to 'Hot Lake' but the hot mud did not seem to help mother much only for the time being.

"I am still working for the Red Cross the ladies here are about to take up Refugee work making

children's clothes and they are so anxious for me to take charge of the cutting but I do not know yet. I certainly can't take on much more, now but may feel better in a week or so. Sending clipping of paper it says we have stopped for a time but this is how I looked Saturday and am still working.

"The cemetery lot is still in Father's name although it has been probated but it will be necessary for some one to hold the title & we thought it would be better as long as Jim's baby is laid there it would be better for Jim to hold it. To do this it will be desirable to have a quit claim signed by all the heirs until such time as the city takes it over. Will this plan meet with your approval? Now Jule if you or Joe want to know anything write and you may rest assured if anything is left it will be divided equal and all treated alike.

"The idea of Jim farming Greenhurst would have meant his working his head off and then going broke as the only salvation for Greenhurst is stocking it heavy with pure breds and the expense almost prohibitive. Stock is out of reach almost in price. Think Jim is going to do fine with the Silo business his salary goes on the same and he gets a com. They keep his car up repairs, etc. He said you let him have \$400 and he wanted \$350 more and we were glad to let him have it. Then N— is putting him on to stock com. He can work it when out with Silos buying & selling stock. N— says

Jim would be fine at it and it takes little or no capital, and means good money.

“Aunt Margaret was telling about seeing we had a lawn party at Greenhurst. You

4.

would have thought so if you could have seen it. We had some sandwiches and Mrs. Dean brought out a pitcher of milk and it kept us busy chasing lambs away until we swallowed the bread. Mrs. Dean is very pleasant and when N— goes over on business we ride along and go on to the Caldwell ranch, but I can not stand it to go any more am all in when I get home, too tired to ride. When this is settled up Jim will make a statement. We may be able to get something out of Depew near Buffalo. Mother paid \$1000 for it, and the creamery stock R. R. stock etc., Niday & Jim are trying to sell it. Well I guess I have answered all your questions but if not write. And do not think for one minute that everything is not open & above board. We had to give up our recital. I was not able to play, so that is off my mind. Jim & Aunt M— were very much impressed with Miss Lowe and thought she was charming. Now don't think that being at this end trying to get this settled up has been any picnic, and I have often wished some of the rest could have taken a hand at it.

“Must close with love to all.

Niday & Mollie.”

No. 4.

“J. L. NIDAY  
ATTORNEY AT LAW  
BOISE, IDAHO

July 5, 1918.

“Mrs. J. A. Graef,  
Portland, Oregon.

Dear Julia:

“Your favor of recent date has come to hand, and I will say you did quite right in going to headquarters for information, and everything that I have at hand I will furnish to you in the matter of your father’s estate. You will recall that Mr. Green moved to Boise in the fall of the year 1914. He had just had a sale of his personal property at the ranch, and at that time was quite heavily in debt at the Citizens Bank of Nampa and Mr. Larson, the cashier of that Bank had charge of the sale, and upon settlement with him by your father the indebtedness due the Bank was deducted leaving Mr. Green in the neighborhood of \$500.00 in cash, which he brought to Boise, and as I remember it, placed the money in the Idaho National Bank, and took five \$100.00 certificates of deposit therefor. This money Mr. Green looked after himself, and I have no record of its expenditure, as it was done under his own supervision and order. It went into his living expenses, however, and in the payment of his miscellaneous bills at Nampa. These



were not all paid at once, but payments made along on them until some time later when the whole of them was paid, and entirely cleaned up. I do not remember how much money he got out of the sale of his personal effects, but do know that most of it, in fact all of it but substantially \$500.00 went to the Citizens Bank of Nampa in payment of money borrowed from that Bank, and the rest of it went as above set forth.

“Now as to the real estate holdings. As you probably know, your father was indebted to Charley Lewis in the sum of \$3,266.00, principal, with accumulated interest making approximately \$4,000.00 which we succeeded in getting paid by deeding Lots 6, 7, 8, 9, and 11 of Elmwood place, known as “Jim’s property” and a team of horses. This being in full of Charley Lewis’s demands against Mr. Green, and thereby that item was cleared, with no money coming to your father therefrom. In fact it was doubtless a good deal to make from his standpoint.

2.

“You probably also know that Mr. Green was indebted to John Templeton and Lizzie in a considerable amount, I have not at hand the exact figures, but approximately \$4,000. This was secured on that part of the E $\frac{1}{2}$  of the SE $\frac{1}{4}$  of Sec. 36 lying South of the Oregon Short Line Railway, comprising about forty acres. This tract you will recall,



lay just across the road north of where the Steph-  
ensons lived.

“Your father owed the First National Bank of Idaho approximately \$19,000. This sum was made up of various items, among which was money borrowed directly from the Bank which with accumulated interest was approximately \$10,000, and with mortgages to secure money borrowed from Volkner, Mullen and Hardiman, the security being that part of Greenhurst lying North and East of the Oregon Short Line Railway and North of the North and South road, being the road that the lane to the house connects with, comprising approximately 108 acres, and the “Ward place,” which you will recall as being close Callopey Station, comprising 80 acres, and what is known as the “Hastriter place,” comprising 65 acres. These three tracts went to Moore, or the First National Bank, but Mr. Green retained the right to redeem these within one year from the date.

“That part of Greenhurst ranch, comprising 212 acres lying South of the North and South road above mentioned was mortgaged to E. H. Dewey, which with accumulated interest amounted to about \$13,000. At that time Mr. Dewey had given your father to understand that that would have to be paid when due January 1, 1916. Mr. Green said that it was out of the question for him to pay it, and real estate then being “in the dumps,” there being

scarcely no demand for farm property in this locality, and the ranch being unable to pay interest on anything close to this sum, it seemed a hopeless case. Mr. Green stated to me that in as much as I had been looking after his business all these years and had never been paid anything for it, that he would like for me to have it, if I was in a position to handle it; that he knew it would not pay its way with the interest burden, taxes and water rents that it had to carry, and would have to be carried at a loss until times or conditions changed. I knew under existing conditions that if Mr. Dewey started foreclosure proceedings that he would get the property, and I was in a position that I could handle it and he made me deed for it. This deed was dated October 1, 1915. I had before that time taken up with the different members of the family, Graef, Jim, Gracia, in fact all of them unless it were Phy, the advisability of all the family contributing to pay off this indebtedness, telling them that we would have to see that Mr. Green was supported during his lifetime and that it was too bad to let all of this property go, but none of them were in a position to aid in this purpose. Come what may, I intended

3.

to see that Mr. Green had what he wanted during his lifetime and therefore when he offered to deed that property to me I accepted it, and as I supposed then, and think yet, the family knew. At

that time Mr. Green was at himself, and that was done which he desired done. If conditions had remained as they were then, I would not have made anything to speak of out of the property, and can not even now pay interest on the investment that I have in it, nor can any one else unless the place is stocked, and of course that entails its additional responsibility in capital as well as time.

“Now, Julia the above is substantially true and correct. I have not included in the statement which I mail you any charges for rent, or the thousand and one small things that has entered into this transaction, but I certainly have been open and above board in all the dealings I have had relative thereto. It is only a lapse of time, and of conditions that would lead any member of the family to think otherwise. It has so turned out, that I may make some money on Greenhurst ranch when the sale is finally consummated, but if I do it is largely, if not entirely, due to my own labor to that end. I have certainly lost money on it ever since I have owned it in its operation, but of course have built it up and shaped it that I might sell. Had conditions remained as they were when it was deeded to me, and I had lost money on it, as I certainly would have done in that case, I don't apprehend any one would have come forward and suggested bearing a part of the loss, but as I probably will make some money out of it by selling, it is slightly different.

However, I have always intended, and so stated to the members of the family here, after Mr. Green had passed away, that if I could sell to advantage I would help the other members of the family, and I still intend so to do. In this all will be treated alike without discrimination. I have contracted to sell the place with a small payment down, and later will know what the outcome will be, and when sufficient is paid that a sale will be assured, I will carry out the purpose above stated, not as a legal obligation, but with the feeling that if I make something out of the property I would like for the children all to share in it, not equally with me, as I am the one who resumed the responsibility and took the risk, but substantially.

“I have endeavored in the foregoing statement and the itemized account enclosed herewith to set forth the conditions as they are, and as fully as I could do without spending a great deal of time in non-essential details, but if I have overlooked anything that you desire to know more concerning I would appreciate your advising me fully and frankly what it is and what you desire to know. So far as I am concerned I have no secrets in this matter.

“I might add to the foregoing that had I known any member of the family desired to invest money to save this property, we could just as well have saved some ten or twelve thousand dollars out of that portion deeded to Mr. Moore. I contemplated



a long time the question of taking this up from Moore, feeling certain that

4.

there was at least \$10,000 in it, but as I knew it would be a losing proposition, unless I could sell, and conditions still remaining dull for sales, I hesitated to take the chance, and yet I felt certain that there was substantially as much margin in this as there was in Greenhurst. There is no doubt that the thing to have done, had we been in a position to take advantage of it, was to have paid off the whole of this indebtedness, something over \$40,000.00, and taken the time to turn it to advantage, but a matter of this magnitude could not be handled in a minute by people of small means, and everything being due and taxes, interest and water charges piling up, it was imperative that something be done promptly, as foreclosures would have meant, not only loss of all the property, but humiliation as well. In considering all of these matters too, we must not overlook the fact that farm property has probably advanced 50% in value since that time.

“There is one other item I overlooked in its order, and that is a payment of \$200 from Mr. Lesh on his lease of Greenhurst for the year 1915, due on or before May 1 of that year. This money was



paid directly to Mr. Green and handled by him, and I therefore have no account of its expenditure.

“Sincerely yours,

JLN:A

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No. 7.

Being a warranty deed dated the 14th day of December, 1918, between J. L. Niday and Mary A. Niday, his wife, of Boise, Ada County, Idaho, the grantors, to A. L. Green and George A. Buell, of Nampa, Canyon County, Idaho, the grantees; consideration \$30,000.00; conveying to said grantees the lands described in plaintiff's complaint and designated as the Greenhurst ranch, containing 212 acres, more or less; acknowledged before Nellie T. Wood, notary public, and recorded in the office of the auditor and recorder of Canyon County on the 2d day of January, 1919.

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No. 11.

Being a copy of a mortgage made on the 14th day of December, 1918, between A. L. Green, bachelor, and George A. Buell and Effie A. Buell, husband and wife, as parties of the first part, to J. L. Niday, of Boise, Idaho, as mortgagee, as party of the second part; consideration, \$23,000.00. The lands described in said mortgage being the same lands as mentioned in plaintiff's complaint and known as the Greenhurst ranch, containing 212 acres of land,

more or less. Said mortgage being given to secure a principal note in the sum of \$23,000.00, dated Boise, Idaho, May 14, 1918, due on or before ten years after date, with interest thereon from date at the rate of seven per cent. per annum, interest to be paid annually. Said mortgage being recorded in the records of Canyon County on the 2d day of January, 1919.

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### DEFENDANTS' EXHIBITS.

#### No. 1.

“Portland, Ore.

Mar. 27, 1917.

“Dear Mr. Niday:

“I have written to Mollie several times but apparently she hasn't received the letters, as she has written several since Dad died asking why I don't write, and why Joe didnt answer your letter. I phoned Joe and he said he hadn't had any but I just remember now a letter that came here. I opened it and phoned him to mail the \$5 to the man at Seaside and he did.

“Dear Auntie and Grandma moved in short order. I was surprised to hear they were already in Nampa. Grandma, in particular will miss Mollie; it has been quite a strain on you people mentally besides financially to run two places.

“I told Mollie in my other letters, that she didn't get, that Joe and I want you both to know that

whatever you decide about Father's affairs is all right with us.

"We sincerely hope that you will be able to swing yourself out of the ranch debt; of course, if you strike gold or oil on the ranch will be glad to know.

"After you probate, will Jim be able to get that piano? I guess the rest wouldn't care and I doubt if it would sell for anything.

"When I was there summer before last Dad was using a pair of pruning shears; if you run across them I'd like to have them on his account, if none of the rest care.

"Joe is quite busy and has quite a crew working, painting an English ship at "The Northwest Steel Works." Says he never painted a boat before but he will know all about it when he gets through. Leaves before seven in the morning as they start work at seven thirty.

"Sorry to hear Kathleen has been sick, she's pretty old to be just having measles.

"Taylor has been very sick again but is better now and doing some building out in Laurelhurst.

"Ella Martin, (who used to be a neighbor) is to marry Mr. Meko next Tuesday, going to Frisco on a wedding trip.

"Mrs. Romig has limbered up a little and we now speak very nicely and politely but no more running back and forth like there used to be. I'm cultivat-

ing "Back to the Home" Movement.

"Dorothy has had earache for two days, bad ear left from masles.

"Dr. Abele has applied as "Chief Surgeon" in one of the Oregon companies.

"The new Interstate bridge across the Columbia and the R. R. bridge here across the Willamette are both guarded by militia.

"These news items are added for Mollie and see that she gets this letter too so she will know I wrote.

"Since Dad had to go, I'm glad that business dealings with Aunt C. ended agreeably. It even seems as though we wouldn't hear from Grandma much any more, she lived a good many years with Dad and had the best there was while he had it. No one could have any but the kindest memories of him and we certainly appreciate your kindness and thoughtfulness where he was concerned.

"No one else could have done what you did and held the rest level at the same time. In settling his affairs, if there is any occasion to know what we think, remember we think as you and Mollie do. Four agree. Wonderful.

"Love to all.

"Julia and Joe."

"P. S. Just had a note from Mollie for Joe to send in claim for money he loaned Dad. I looked through a box of old papers and found the check,

will enclose it and Joe can mail a claim from the office.

“When you have time or if you haven’t, maybe Mollie will, explain how Dad’s affairs stand.

“Tell Mollie to tell me if mail reaches ner better if addressed to your office. Julia.”

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The above and foregoing statement is hereby settled and allowed as the statement on appeal in the above entitled action.

FRANK S. DIETRICH,  
*Judge.*

Endorsed: Filed Aug. 11, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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PETITION FOR APPEAL.

The above named defendants, conceiving themselves aggrieved by the final order and decree adjudging the plaintiff to be entitled to a one-half ( $\frac{1}{2}$ ) undivided interest in and to those certain securities owned and claimed by defendant, J. L. Niday, said securities being taken as part of the purchase price of the lands described in complainant’s complaint, and also conceiving themselves aggrieved from the final decree of accounting, said decree having been made and entered in the above entitled cause on the 26th day of February, 1921, they hereby appeal from said final order and de-



cree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that appeal may be allowed, and that a transcript of the record, papers, and proceedings and all things concerning the same, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit upon their filing a bond for the payment of all damages and costs if they fail to prosecute the said appeal to effect.

J. L. NIDAY,  
MOLLIE GREEN NIDAY,  
GEORGE A. BUELL,  
EFFIE ADA BUELL, and  
A. L. GREEN.

By ALFRED A. FRASER,  
*Solicitor for Defendants.*

Petition granted and appeal allowed.

FRANK S. DIETRICH,  
*Judge.*

July 22, 1921.

Endorsed: Filed July 22, 1921.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

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ORDER ALLOWING APPEAL.

This day came the defendants in the above en-

titled suit appearing by Alfred A. Fraser, their solicitor of record and presented their petition for an appeal and an assignment of errors accompanying the same, which petition is hereby allowed and the Court allows an appeal of the above entitled suit to the United States Circuit Court of Appeals for the Ninth Judicial Circuit upon the filing of a bond in the sum of \$200.00, with good and sufficient security to be approved by the Court.

FRANK S. DIETRICH,

*Judge.*

Dated, Boise, Idaho, this 22d day of July, 1921.  
Endorsed: Filed July 22, 1921.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

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#### ASSIGNMENT OF ERRORS.

Now on this 21st day of July, 1921, came the defendants by their solicitor, Alfred A. Freser, and say that the decree entered in the above entitled cause on the 26th day of February, 1921, is erroneous and unjust to the defendants.

#### I.

Because the Court erred in not dismissing said action on account of the staleness of the claim and for the further reason that the plaintiff was guilty of such laches as not to be entitled to any relief in a court of equity.

## II

Because the Court erred in not dismissing so much of the plaintiff's claim as is based upon the assignment to her of the interests of Filo F. Green and Gratia K. Acuff, of the subject matter of this suit on account of the staleness of such claim and laches of said Filo F. Green and Gratia K. Acuff; and the Court erred in granting any relief to said plaintiff on these assigned claims.

## III.

Because the Court error in not dismissing the plaintiff's bill of complaint for the reason that there is no allegation in said bill of complaint offering on the part of the plaintiff to do equity or to place the defendants in statu quo; and for the further reason that there was no offer made by the plaintiff upon the trial of said action offering to do equity or to place the defendants in statu quo.

## IV.

Because the Court erred in not dismissing the plaintiff's bill of complaint for the reason that said bill of complaint does not set forth any reason for her delay in bringing this action.

## V.

Because the Court erred in not dismissing the suit for the reason that the evidence shows that the plaintiff procured the assignments to her of the interests in the subject matter of the suit of Filo F.

Green and Gratia K. Acuff, for the sole purpose of confirming jurisdiction of the trial court.

#### VI.

Because the Court erred in overruling defendants' objection to the introduction in evidence of the complainant's Exhibit No. 8, which was introduced for the purpose of impeaching the witness John M. Green, called on behalf of the complainant.

#### VII.

Because the Court erred in holding that the deed to the lands described in the complainant's complaint, known as Greenhurst Ranch was given to the defendant, J. L. Niday, without adequate or sufficient consideration.

#### VIII.

Because the Court erred upon the accounting between the parties in denying to the defendant, J. L. Niday, a credit in the sum of Four Thousand (\$4,000.00) Dollars, earned by him in professional services rendered said R. E. Green prior to the execution of said deed.

#### IX.

Because the Court erred in holding in the interlocutory decree that the deed dated the 22nd day of December, 1914, and the deed dated the 1st day of October, 1915, are or were voidable at the instance on the grantor, R. E. Green or his heirs.

#### X.

Because the Court erred in adjudging and de-

creeing to the complainant, Julia Green Graef, in her own right and as assignee of the interests of Filo F. Green and Gratia K. Acuff, to be entitled to a one-half interest in and to, or the proceeds of the sale of the lands described in plaintiff's complaint.

### XI.

Because the Court erred in holding that the complainant is entitled to a one-half interest in and to that certain mortgage bearing date of the 14th day of December, 1918, and recorded at page 279 of Book 70, of the mortgage records of Canyon County, Idaho, said mortgage covering the property described in complainant's complaint and also in decreeing said complainant to be entitled to a one-half interest in the note secured by said mortgage, which said note represents the balance of the purchase price of said Greenhurst ranch.

### XII.

Because the Court erred in decreeing and requiring the defendant, J. L: Niday, to deposit in the Boise City National Bank an assignment in due form of a one-half interest in and to the note and mortgage above mentioned.

### XIII.

Because the Court erred in granting or decreeing to the complainant any relief whatsoever in this suit.

ALFRED A. FRASER,  
*Solicitor for Defendants.*



Endorsed: Filed July 22, 1921.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanzer, Deputy.

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(Title of Court and Cause.)

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BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, J. L. Niday, as principal, and A. R. Cruzen, as sureties, acknowledge ourselves to be indebted to Julia Green Graef, appellee in the above cause in the sum of \$200.00, conditioned that, whereas, on the 26th day of February, 1921, in the District Court of the United States for the District of Idaho, Southern Division, in a suit pending in that Court, wherein Julia Green Graef was plaintiff and J. L. Niday, and Mollie Green Niday, his wife, George A. Buell and Effie Ada Buell, his wife, and A. L. Green were defendants, a decree was rendered against the said defendants and said defendants having obtained an appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit Court and filed a copy thereof in the office of the Clerk of the Court to reverse the said decree and a citation directed to the said Julia Green Graef citing and admonishing her to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit Court, to be holden in the City of San Francisco, in the State of California on the 22d day of August, 1921, next.

NOW, if the said defendants or either of them shall prosecute an appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void else to remain in full force and virtue.

J. L. NIDAY,  
A. R. CRUZEN.

The above and foregoing bond is hereby approved by me this 25th day of July, 1921.

FRANK S. DIETRICH,

*Judge.*

Endorsed: Filed July 25, 1921.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

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CITATION ON APPEAL.

United States of America, )

) ss.

Ninth Judicial Circuit. )

To J. L. Niday and Mollie Green Niday, his wife,  
and George A. Buell and Effie Ada Buell, his  
wife, and A. L. Green, Greeting:

Whereas, Julia Green Graef, appellant in the above entitled suit, has lately appealed to the United States Circuit Court of Appeals for the Ninth Judicial Circuit from a decree lately entered in the District Court of the United States for the District of Idaho, Southern Division, made in favor of you,

the said J. L. Niday and Mollie Green Niday, his wife, and George A. Buell and Effie Ada Buell, his wife, and A. L. Green, and has filed the security required by law; you are, therefore, hereby cited to appear before the said United States Circuit Court of Appeals at the City of San Francisco, State of California, on the 22nd day of August next, to do and receive what may pertain to justice to be done in the premises.

Given under my hand at the City of Boise in the Ninth Judicial Circuit this 22d day of July, in the year of our Lord One Thousand, Nine Hundred Twenty-one.

FRANK S. DIETRICH,  
*Judge of the District Court of the  
United States.*

Due service of the within Citation on Appeal, by certified copy thereof, as required by law, is hereby acknowledged at Boise, Idaho, this 22nd day of July, 1921.

ALFRED A. FRASER,  
*Of Solicitors for Appellees.*

Endorsed: Filed July 22, 1921.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

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PRAECIPE.

To the Clerk of the above named Court:

Whereas the defendants in the above entitled action desire to appeal from the judgment heretofore rendered in said case, you will please prepare and certify for the appeal of the defendants herein to the Circuit Court of Appeals of the United States for the Ninth Circuit copies of the following:

- (1) Plaintiff's complaint.
- (2) Answers of defendants.
- (3) Original decision of the Court filed October 25, 1920.
- 4) Interlocutory decree of the Court, filed December 23, 1920.
- (5) Final decree of the Court, filed February 25, 1921.
- (6) Prepared statement of the evidence which has been lodged in the Clerk's office by the appellants.
- (7) Defendants' petition for appeal and citation on appeal.
- (8) Order allowing appeal.
- (9) Assignment of errors.
- (10) Appeal bond.
- (11) Citation showing acceptance of service thereof.
- (12) Certificate of the Clerk.

ALFRED A. FRASER,

*Solicitor for the Defendants.*

Endorsed: Filed Aug. 11, 1921.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

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STATEMENT OF JULIA GREEN GRAEF,  
APPELLEE AND CROSS APPELLANT.

This cause came on to be heard before the above entitled Court on the 4th day of October, 1920, and after the close of all the evidence it was stipulated between the plaintiff and the defendants, acting by their respective attorneys of record, that if a decree was entered in favor of the plaintiff the plaintiff would consent that the title which she received under such decree could be confirmed in the defendants, George A. Buell and Effie Ada Buell, his wife, and A. L. Green, and thereafter and following the rendition of the interlocutory decree of the Court in favor of the plaintiff the cause again came on for hearing for the purpose of determining an accounting between the plaintiff and the defendant J. L. Niday, at which time the following proceedings were had, to-wit:

MR. FRASER: If the Court please, this is the morning set for final hearing in the case of Graef v. Niday. I will state in the opening that it is a rather inconvenient time for myself, for the reason that we have had a hearing before the Public Utilities on the telephone rates for the state. We expected to get through Saturday night, and there are eight or ten witnesses here from Denver and Salt Lake, and we could finish today, and those



witnesses could go home. Mr. Montgomery informs me, however, that he has a matter set in Portland that necessitates his getting away this evening, if he can, so we are both in a rather embarrassing situation; but we thought perhaps if we could call the Court's attention to the matters in dispute the Court might indicate its ruling, and it is possible that we could finish the matter this forenoon, and I could have the afternoon before the Utilities, and Mr. Montgomery could get away.

One of the matters in dispute, if the Court please, is as follows: In the former hearing in this case Mr. Niday testified as to the payment of this mortgage on the land, and of course that matter is not in dispute. He also testified in regard to the transaction between himself and Mr. Green by which title was vested in himself, that there were two pieces of land, one of six acres and the other the larger tract, and in regard to the six-acre tract he testified that he got that from Mr. Green and he was to advance Mr. Green a certain amount of money in consideration of the six-acre tract, to help support Mr. Green in his old age. And he testified to the amount of those advances that he gave to Mr. Green from time to time of this transaction to the time of his death. And it is our position or contention that the heirs in this action are in no better position than Mr. Green would be if he were the plaintiff; and if he were

here we think in equity he should reimburse us for these moneys which we paid out for his support and keep during this time.

THE COURT: Did Mr. Niday testify to any specific amount?

MR. FRASER: Yes. There was an itemized list filed here of those amounts. That is one matter.

The other matter the Court probably has ruled on, but we would like to present it again in this final hearing, and that is, Mr. Niday testified that the consideration of the larger deed was for services he had rendered Mr. Green as attorney, for which he had never been paid, and that Mr. Niday claimed he should be entitled to some attorney's fees in that matter; however, to present that again, and have a final ruling of the Court upon that.

The only other matter I can think about, and there was no evidence presented on that, and that is the commission on the sale of this land and the amount which Mr. Niday would be entitled to for acting as agent, you might say, in taking care of this property, in other words, in procuring renters, collecting the rents, overseeing the property. And I don't know—we told Mr. Montgomery when he was here before what we would consider a reasonable amount for that, and I don't know whether he desires to dispute that amount or not. But I

think those are the only questions I can think of at the present time for the Court to pass upon.

MR. MONTGOMERY: Now, if the Court please, at a time when Your Honor was absent from the city, we came here and held a conference with Mr. Fraser and Mr. Niday, acting in accordance with the Court's suggestion in the opinion in this case, for the purpose of arriving, if possible, at some basis of settlement in accordance with the directions which this opinion had given, but for some unknown reason we were unable to get together on any of the propositions. It was first contended, as already suggested by Mr. Fraser, that the opinion did not intend to exclude the \$4,000 attorney's fee which Mr. Niday claimed that he had rendered, for services which he had rendered to Mr. Green. That was presented on the trial as part of the consideration of the conveyance, and the decision of the Court expressly eliminated that \$4,000 from consideration, by stating that in your honor's opinion there was no intention of presenting a bill for those services. That was likewise your honor's suggested finding at the close of the trial. When that amount again appeared in the statement which Mr. Niday presented to us for settlement we said that we could not agree upon that, and it seems to me that if your honor conforms to the findings and statements made in the decision

there is nothing to argue upon that question, because the matter has been adjudicated.

As to the second proposition advanced by Mr. Fraser, which was likewise advanced in that hearing, a question is now raised as to the consideration for the first deed. That matter was presented completely upon the trial, and upon that matter your honor expressly made a finding as follows: "As to the first deed, he explains, in substance, that when the settlement was made with creditors he induced them to release this small tract, and thereupon Green deeded it to him, with the statement only that he, Green, would have to call on the defendant for money from time to time. It does not appear that any price was fixed, or what amount, if anything, was ever paid by defendant on account of the transaction, or that the defendant ever recognized that he was under any legal obligation whatsoever; nor is any reason given why the actual consideration was not specified in the deed." That is the identical question which counsel again raises this morning, and was raised at the time of our endeavor to come to a final adjustment. So it seems to me that both of those questions have already been disposed of upon the main hearing, and would not be proper claims to now present in connection with the accounting.

In addition to those two claims, Mr. Niday also presented at this hearing which we held claims,—



at the time he had a typewritten statement of certain claims which he wanted considered. I asked to retain a copy of it, but he said it was not complete enough and he would furnish it to us, but it has not been furnished in the meantime. That statement presented at that time presented claims for personal funds which had been advanced, according to Mr. Niday's claims, to Mr. Green,—nothing, so far as I could see from the statement, in any way connected with the real property in controversy. The estate has been probated here, claims have been filed, in Mr. Green's personal estate, and individual sums of money furnished by Mr. Niday it seems to me that is the proper place to present them, and it seems to me they are in no way involved in this suit. We therefore objected to any long series of items of a personal account that properly belonged in the Probate Court.

The next question that was presented and upon which there was no dispute was the question of the commission to be allowed Mr. Niday for the sale of the property as indicated in Your Honor's opinion. They fixed a certain amount, as I remember, \$1500, as a reasonable commission, and I had no objection to the amount as fixed, that is, that would be charging half to the plaintiff in this case, insofar as the amount was concerned, but I did desire to suggest to Your Honor in that connection at this hearing and upon this proposition that there



was no agreement at that time, which I don't blame the other side for, that in the event Mr. Niday was allowed a commission for the sale of this real property, together with compensation for what he claimed to be the expenses incurred in overseeing the maintenance of the property, that the plaintiff in turn should, as a matter of equity, be allowed reimbursement for necessary attorney's fees which she has been compelled to pay out in order to recover her interest, together with a large expense which she has been put to in coming here to Boise, that are not ordinarily recoverable under the statute; and in connection with this hearing I desire to simply present a claim in that particular. It seems to me that in equity and good conscience, if he is allowed a commission for selling that which, under the theory of our case, was obtained by undue influence, that the heirs should at the same time be reimbursed for the expenses to which they have been put, at least the plaintiff in the case. And likewise in that connection there is a very recent decision from the District of Columbia that I found in the last issue of the Federal Reporter, wherein the Court of Appeals in affirming the lower Court charged the grantee, who in that case had obtained a deed by assuming a mortgage of \$4000 and paying an additional sum of \$1500 cash, the property being of \$7,000 in value, that in the instance where the deed was set aside the Court charged the gran-

tee with the reasonable use of the property. There was no question presented there as to commission for sale, although the property had been sold; but he was likewise charged with use. And therefore in this connection I desire to present this feature of the case, owing to the fact that it was not discussed by Your Honor in your opinion, as to our right to recover a reasonable attorney's fee, together with expenses that the plaintiff has been put to in coming to Boise, and a reasonable amount for the use of the property during the time the defendant had it.

I think that those items which I have mentioned constitute the only matters of dispute between us. But the item of \$4000 as an attorney's fee, the item of \$500 in connection with this first deed, as I suggest, was thoroughly and completely discussed upon the trial, and it seems to me have been very completely covered by the findings already made, and the present attempt would be simply an endeavor to review those findings. And in the next place certainly Mr. Niday could not be allowed a claim in connection with the real property which dealt solely with the personal estate of the deceased and is in no way connected with the management of the real property. Even in this claim as presented to us there was either a debit or a credit for moneys collected or advanced or something out of the Satterfield estate. I asked for an

explanation of that and was unable to obtain it for some reason, and it was suggested that I write to Mr. Satterfield, and I did that, and received a reply that Mr. Green evidently received an income from the Satterfield estate up to about two months before his death, the exact amount of which he didn't know. If Mr. Niday is going to present a claim for the handling of the Satterfield estate certainly the heirs should be credited with the amount received for Mr. Green. It seems to me that all of these matters,—the first two have been adjudicated—the personal claim is not properly in this case, and as against the commission and the other allowances, the plaintiff should be allowed her reasonable expenses and attorney's fees in conducting the present litigation.

MR. FRASER: If the Court please, in answer to counsel, in regard to the second proposition, that we should be entitled to credit for the moneys we advanced to Mr. Green after the conveyance of the six acres, to the time of his death; it was impossible for us to present a claim to the executor, for the reason that until this deed was set aside we had the property; and under Mr. Niday's testimony the consideration for the deed was these very advances that were thereafter made, and as long as we held the property we could not present our claims to the probate court or against the estate of Mr. Green. In the case which counsel read from

there they made an account for the value of the use of the property. In the case at bar Mr. Niday is charged, under the former opinion of the Court, and he has accounted in this case, for all the rents, issues and profits of the estate which he received during that period of time. He has in other words benefited nothing by reason of holding this land in his name up to the present time if he accounts for the rents and profits which he has testified to having received. If Mr. Niday had gone on to the farm and lived on there, and had the benefit and sold the produce and had the use and the occupation, but in this case he did not do so; the premises were rented, and the rents have been accounted for in this hearing already; so the conditions are not similar at all.

On the matter which he refers to, the Satterfield matter, as I recollect, he claims there was an account presented to him when he was here before, having reference to that, and as I recollect it, it was this, that Mr. Niday collected for Mr. Green from Satterfield, or other matters, small amounts of money, and those amounts he gave credit for in the statements we submitted to counsel. In other words, we claimed as an offset, those amounts were deducted, these amounts which we collected from the Satterfield estate.

THE COURT: Where is this statement, gentlemen? Was it introduced?



MR. FRASER: It was introduced in evidence.

MR. NIDAY: It wasn't introduced in the exhibits. It was testified to.

THE COURT: I know you testified at some length to the handling of the farm, and from year to year what the result would be after charging interest and crediting rent, etc., but I don't remember anything about these other items.

MR. NIDAY: That was in relation to the profits of the farm. That testimony was for the purpose of showing that the value of the farm at \$15,000 was an excessive value, because the amount I put into it was a losing proposition. But the Court will remember I testified that I had advanced of my own funds to Mr. Green on account of these lands and other transactions twenty-eight hundred and some dollars and was entitled to certain credits. Those credits, however, were not put in. The evidence, if the Court will pardon me, or the statement of counsel concerning the Satterfield matter, grew out of this. These funds or moneys were advanced from time to time to Mr. Green, covering practically the period of time when he came over here to the time of his death, and were his living expenses. And these Satterfield matters were moneys that I had collected for Mr. Green for commissions on services that he had rendered the Taylor and Satterfield estate as administrator of that estate, in selling lands and handling the estate of



Taylor and Satterfield. Of course I was advancing money all the time, and when those moneys came in they were merely charged up against the moneys I had advanced.

THE COURT: Of course my recollection is probably at fault, but I don't remember any testimony at all upon that point.

MR. NIDAY: I think the Court is correct in your memory as to the Taylor and Satterfield items, but the \$2800 item, that I had advanced, is in the record.

MR. MONTGOMERY: My recollection is the same as Your Honor's, that there was no testimony as to the amount of money advanced. In fact, Mrs. Acuff testified that the children helped contribute to the support of Mr. Green.

THE COURT: Yes; I remember she testified that there was some sort of an understanding that each one of the children were to contribute so much.

MR. NIDAY: As a matter of fact, none of them did.

THE COURT: Mrs. Acuff testified that she had contributed small amounts, but I don't remember that there was any other testimony upon that point, and I don't think there was any testimony as to what others contributed, except in a general way she said some were able to and some did not. Now my attention might be called to the precise status of the record upon this particular

point, but as I remember the testimony of the defendant touching the circumstances surrounding the execution of the second deed, it was simply to the effect that Mr. Green offered to turn over the land to him because if he didn't get it Mr. Dewey would, that he had rendered attorney's services; there was no reference at that time to any moneys that Mr. Niday had advanced, if he did advance any, or that he was to advance. Now, if that be the case, I hardly see how I can take such an item into consideration at the present time, because there may be a great many equities as between the several heirs. Now if my memory is at fault in that respect, I shall be very glad to have it corrected. I don't recall any reference at all in the testimony in connection with this except the apparent belief on the part of Mr. Green that he was going to lose the land anyway, and that Mr. Niday had rendered him some legal services.

MR. FRASER: If the Court please, I may be mistaken, but my recollection is that Mr. Niday did testify as to the amount of money which he advanced under the conveyance of the six acres.

THE COURT: That may be, although I don't remember that.

MR. FRASER: I may be mistaken, but I have a recollection that that is in the record in Mr. Niday's testimony. But I would suggest this, that this matter of accounting would only be pertinent

when the Court should first decide to set aside that conveyance, that if there was no testimony at all upon that question in the prior hearing we would be entitled to an accounting, entitled to make our proofs as to our credit and offsets in the accounting proceedings; in other words, we would not be barred. We might have tried the case solely upon the theory first that the conveyance was a valid conveyance, and if the Court had so held there would be no necessity of putting in any evidence at all on the question of the accounting. But I have a very strong recollection that Mr. Niday did testify as to the amount of moneys he advanced under the six acres. The stenographer probably could turn to Mr. Niday's testimony.

THE COURT: I was going to say, touching the first deed, that it is in my mind that—well, there is such an expression in the opinion, I think, that there was some statement on the part of Mr. Niday in his testimony that Mr. Green remarked at the time the conveyance was made that he would have to call upon him for funds. We might refer to the record for the purpose of seeing whether or not there is any evidence at all as to that amount. If there is such evidence, possibly it should be considered. That is about the only matter concerning which I have any doubt, gentlemen,—the first item suggested by Mr. Fraser, the matter of advances on account of the transfer of the six acres,—and such

advances could only be considered by way of reducing or wiping out the value of the six acres. As to the attorney's fees, I don't think it is necessary for me to say anything further. It is wholly incredible to me that there was any intention to charge for these services, in view of the state of the record and the testimony. I think we are all aware of what is more or less a common thing,—referring to my own experience, and I think perhaps each one of us, if we have relatives, know that we are rendering services all the time that way for which we don't expect to charge and the relatives don't expect to pay; and perhaps in turn we get services for which we don't intend to pay,—if there is a professional man in the family—it may be a lawyer or a doctor. And I am so fully satisfied that Mr. Niday didn't expect to charge for these services and Mr. Green didn't expect to pay for them that I have no disposition to reconsider the point.

I understand you to say there is no disagreement about the commission. I was on the point of putting in the opinion the rate of commission, because there is a sort of an understanding I have outside of court that five per cent is the ordinary going rate here.

MR. FRASER: That is the amount.



THE COURT: But I think perhaps I thought I ought not to take judicial knowledge of the fact, although it is a well known fact.

Now as to the matter of some compensation to Mr. Niday for his supervision, I am not sure whether you have disagreed about that or not.

MR. FRASER: We suggested when Mr. Montgomery was here, considering the value of this property and the number of trips, and collecting the rents, we thought \$300 a year would be as low a price as you could get any real estate man to handle that property for and look after it and rent it and collect the rents.

MR. MONTGOMERY: It did seem to me that \$25 a month, considering the fact that during all this time—he wasn't out there operating it—he claims to have leased it independently,—and so far as I can see all he had to do was to make the lease and collect the rents under the lease, and no further supervision, and it seemed to me that \$25 a month for services of that character was sufficient.

THE COURT: What was the length of the period?

MR. MONTGOMERY: The first deed was December, 1914, and the second deed October 1, 1915. That would be from October 1, 1915, to the date it was sold, which would be December or January,



1918, the date of the deed to the present occupants, if I remember correctly.

THE COURT: Practically three years.

MR. MONTGOMERY: Deed from Mr. Niday December 14, 1918.

THE COURT: A little over three years, then.

MR. MONTGOMERY: A little over three years. I would like to suggest, too, in connection with the objection, the statement I made a moment ago, that under such circumstances the defendant, by virtue of having the possession of property, having the right to sell the same at any time and do what he wanted with it, would logically entitle the plaintiff to a claim for the reasonable use by the defendant, and it seems to me that is a reasonable privilege in that particular. That suggestion I take from this recent case of which I spoke, wherein just such an allowance was made, in view of the fact that a deed had been procured under very similar circumstances.

THE COURT: Wouldn't the use be covered by the rental? Isn't that the kind of use for which the party would be charged?

MR. MONTGOMERY: Yes. But there was a brief period of time that the property was not under rental, wasn't there? .

MR. NIDAY: There was no time after I had the property that I in any way had the use of it.

THE COURT: No. I so understand. Even

though there was a brief period that it wasn't under lease, if he didn't occupy it, if he didn't have any benefit out of the use of it, he couldn't very well be charged with the use.

MR. MONTGOMERY: If course that would likewise prove the fact that he had no particular difficulty with the property for the maintenance of it, that he simply turned it out and drew in his rental and had no burdens to carry or work to perform in connection with it.

THE COURT: I think, gentlemen, that it is somewhat difficult to get at it precisely, but I think I will make an allowance of \$300 a year for an even three years, which would be \$900. I doubt whether you could get anyone to take care of property, that is, a competent person, to take care of property of that kind for that length of time for less. Take into consideration that there was a feeling on the part of Mr. Niday that he was handling it for himself, and you doubtless got better service in that way than you would have gotten from just the ordinary agent. I don't know what a real estate agent would have handled it for; there is no evidence upon that; but taking into consideration all the circumstances of the case, I don't believe that would be out of reason. So I shall make an allowance of \$900 on that account.

MR. MONTGOMERY: That would be, of course, on the theory that the plaintiff be charged

half of the allowance?

THE COURT: Of course, all of these charges would be charged against the property as a whole, commissions and everything, and the plaintiff here would only pay her proportion, whatever that may be. I don't see how, Mr. Montgomery, I can allow you attorney's fees. Each party has had expenses. It isn't a case where I have been able to find such positive or actual fraud as would justify me in penalizing the defendant, and hence I think I shall let the costs and expenses follow the ordinary rule.

That would leave but the one question, gentlemen, and that is as to whether or not the record is such that I can allow, as against the value of the six acres, any advances made by Mr. Niday. Now if you can get the reporter to read to me such parts of the record as you think bear upon that—

MR. FRASER: I would ask the reporter to look up Mr. Niday's testimony as soon as he can.

THE COURT: As I understand, it is agreed now that such testimony as there is, that is, evidence as there is, is the oral testimony of Mr. Niday, that no statement was put in?

MR. MONTGOMERY: Just as a matter of information, if the Court please, for the simple reason that when we get through we can't seem to agree even upon the Court's decision as rendered,—I understand personal allowances or advances of

which Your Honor speaks now would not apply in any sense to the second conveyance?

THE COURT: Not at all.

MR. MONTGOMERY: So if an attempt is made to apply to the whole transaction, those should be excluded?

MR. NIDAY: That is correct. We don't claim that they have any connection.

MR. FRASER: This transaction can't be considered as an entity, if the Court please, for the reason that there was a period of one year between the conveyance of the first and second pieces of property, and the six acres was conveyed a year prior to the conveyance of the balance of Greenhurst. He did not assume any mortgage against the six acres or pay it off, and he testified that the consideration for that six acres was that Mr. Green expected him to advance some money for living expenses, and Mr. Niday's testimony is clear and distinct that that was the consideration for the six acres.

MR. MONTGOMERY: In connection with dealing with the property as an entity, I will just call the Court's attention to—there was an allegation in the answer—there is an allegation in the answer filed in the present suit, dealing with the property as an entity, and the early part of this evidence which was read before Your Honor came in likewise dealt with it as an entity.



“Defendants deny that at the time of the execution and delivery of the deeds mentioned in the bill of complaint the real property covered thereby was of the actual and reasonable value of more than thirty thousand dollars or of any value whatsoever in excess of fifteen thousand dollars.”

That isn't the allegation. That paragraph denies that the property was worth in excess of \$15,000, “and these defendants deny that said J. L. Niday did not pay to said R. E. Green any valuable or adequate consideration for the real property described in said deeds.”

And the answer throughout, in dealing with the allegations of the complaint, deals with the conveyances as an entity, and as I say, the defendants' own evidence has dealt with it as an entity from the very inception of the testimony offered here and it seems to me that any attempt at this juncture to segregate it—there is no claim of Mr. Niday that these attorney's services were rendered in consideration for the 206 acres alone. It was claimed that they were rendered for the two deeds, the one in 1914 and the one in 1915, and I cannot see any logical theory upon which the defendant can now claim the right to segregate these transactions at this juncture of the proceeding. It seems to me, for that reason, these advances should not be allowed.



THE COURT: I don't believe I quite understand your position, Mr. Montgomery. You say the property has been treated as a unit. Of course, for the purpose of ownership it was, after the delivery of the second deed. Apparently Mr. Niday claimed to own both tracts, and from that time on doubtless treated them as a unit. But as to the matter of attorney's fees to which you have just referred, that came up only in connection with the second transfer, as I remember; but Mr. Niday in testifying here, it is true, testified to the value as an offset to the value of the property as a whole. I have found that the whole matter of attorney's fees is an afterthought.

MR. MONTGOMERY: But the point I make, Your Honor,—and the difficulty in taking this individual portion and reading it separately from the rest clouds the point I am trying to make—Mr. Niday, in his testimony, in dealing with the entire subject of the litigation, by dealing with the subject of the attorney's fees in relation to the entire transaction, that is, that the consideration for the entire deal, the purchase of Greenhurst, was the assumption of the mortgages,—when counsel says there was no mortgage on this six acres counsel is mistaken; there was until November, 1914, if I remember correctly, when this separate deed was made to Crawford Moore, was the first that any attempt was made to segregate this mortgage from

this six-acre tract. And Mr. Niday has claimed throughout, from the first inception, that he assumed the mortgages on the entire 212 acres, given to Mr. Dewey.

THE COURT: I haven't so understood it, Mr. Montgomery. I don't understand that Mr. Dewey ever had any mortgage on the six acres.

MR. MONTGOMERY: Yes, he did, Your Honor.

MR. NIDAY: I think the record shows that he didn't.

MR. FRASER: You are wrong in that, Mr. Montgomery. Mr. Dewey never had a mortgage on that six acres.

THE COURT: Mr. Dewey's mortgage never did attach to this six acres.

MR. MONTGOMERY: I have the abstract right here, Your Honor.

THE COURT: I don't see how any other construction could be put upon Mr. Niday's testimony. I may be wrong about it, but the testimony just read would indicate that.

MR. MONTGOMERY: At the time of that transaction.

MR. FRASER: That was prior to the deed to Mr. Dewey.

THE COURT: You mean that subsequently the Dewey mortgage covered the six acres?

MR. MONTGOMERY: No. The Dewey mort-

gage existed long prior to November, 1914, and at that time the Dewey mortgage existed on the 212 acres.

MR. NIDAY: No, it never did.

MR. MONTGOMERY: That is my understanding of it, but I will have to check the description.

MR. NIDAY: That is a mistake.

MR. FRASER: Here is the mortgage itself. It says 206 acres more or less.

MR. MONTGOMERY: What is the date of that mortgage?

MR. FRASER: The 31st day of January, 1913.

MR. MONTGOMERY: What is the amount of that?

MR. FRASER: \$1683.

MR. MONTGOMERY: The other one.

MR. FRASER: The first one, the sum of \$10,000, said premises containing in all 207 acres more or less. The \$10,000 was on it, and then they put on a mortgage for \$1600, which is the interest on the \$10,000.

MR. MONTGOMERY: If that is correct, I am mistaken.

MR. FRASER: The original mortgages are here for your inspection.

MR. MONTGOMERY: What was this six acres taken out of when it was released from the mortgage?

MR. NIDAY: From the lands that Volkmer had.

MR. MONTGOMERY: It was mortgaged then at that time?

MR. NIDAY: To Volkmer, yes. That was in 1914.

MR. MONTGOMERY: When this was extracted from that mortgage who paid the interest on the portion that applied to the six acres?

MR. NIDAY: The property that was covered by the Volkmer mortgages was all conveyed to Mr. Moore except the six acres.

MR. MONTGOMERY: Mr. Moore then gave back the six acres to Mr. Green as a gift?

MR. NIDAY: No; it was never conveyed to him.

MR. FRASER: Mr. Moore released as far as the six acres was concerned.

MR. NIDAY: He only got a deed for the balance, without the six acres.

MR. MONTGOMERY: Likewise and in connection with that testimony, if the Court please, there is a letter which was introduced in evidence here, written by Mrs. Niday herself and signed by Mr. Niday, which would be in conflict with the evidence just read there, to the effect that Mr. Green had no other source of income or no other funds.

MR. NIDAY: Signed by me?

MR. MONTGOMERY: Signed in your behalf, and Mrs. Niday testified that it was likewise writ-

ten on your behalf. The letter itself states here that Mr. Niday was present with her, helping her write this letter, and it is signed Niday and Mollie, and Mrs. Niday testified that she did write it in the presence of Mr. Niday, and Mr. Niday did not deny that upon the witness stand, and this letter says, "When father came to Boise he had \$500 that was put in certificates, \$100 each, and was used in paying off his personal expenses as long as it lasted, which was not long. This was all by check, and I have the record." So apparently Mr. Niday's statement in that particular is contradicted by the record itself.

MR. NIDAY: I think, if the Court please, that we have testified that right along, and I stated it in the record myself, and it is in the record.

MR. MONTGOMERY: But the statement now advanced is that Mr. Green had no money, and he offered you this deed, as I understand it, because he might need money, and for that reason you agreed to make advances on the six-acre tract.

MR. NIDAY: He owed more than that then.

MR. MONTGOMERY: Of course, if the Court please, even in spite of this testimony, this argument, we still get back to the main issue of the case, that this deed of 1914 is in exactly the same category as the deed of October 1, 1915, a deed from an old gentleman to his attorney in a confidential relation, with no specific agreement upon



the part of the attorney to support him during any period of his life, augmented by the further testimony that the other children had agreed to and did contribute to his support, and it doesn't seem to me that the rule of law can be changed by the additional statement of the defendant that at that time Mr. Green stated to him that he might need some money and he would give him a deed. The same rule would apply to the one deed that would apply to the entire transaction, and when the record is taken as an entity I don't see how it can be claimed, after reading it as a whole, that there was originally any attempted segregation, that the thing was dealt with on the basis of an entire transaction, just the same as Mr. Niday was asked on cross-examination why he withheld the deed from record, and he said it was to get a loan on the property. Both of them were withheld from record. And if the theory now advanced is correct, that there was no other object in withholding the deed from record, the same rule of law applicable to the original case is in no way changed by this statement, as far as I can see, except that the witness now claims that he should be entitled to certain advances for money which was actually advanced.

THE COURT: There would be no distinction to be made between this deed so far as the legal considerations are concerned and the other deed, with this exception, this possible exception, and that is

as to whether or not the Court should grant relief to the plaintiff in this case without requiring equitable treatment of the defendant, that is, under the facts as I have found them to be, this was not a valid transaction, referring to the first deed, for two reasons, one, that Mr. Green was mentally in such a condition that he could not be regarded as competent to transact business generally, I mean in the more important items of business, and the other that there was no agreement as to price, the price to be paid for the land. Now if there had been a definite agreement as to the price to be paid for the land, and it had been reasonably adequate, I am not at all sure that the transaction could be held to be invalid, for, as has already been stated, I was not able to hold that Mr. Green was totally incompetent. He was competent to transact certain business. There was a mental weakening, and this would have been a very small matter, six acres of land saved out of a sort of a wreck, the saving being due in part at least to the service and interposition of Mr. Niday. Now, if at that time, Mr. Green had said to Mr. Niday, "I shall be in need of four or five hundred dollars, whatever the land is reasonably worth, and you will take it and pay this money to me from time to time as I need it," I am inclined to think that the transaction might be sustained, but according to the testimony there was no such agreement, sim-

ply some sort of a general statement that he, Mr. Niday, could take title to the land, and Mr. Green would require some advances. But even if a person were wholly competent, such a transaction would be voidable, to say the least, for the agreement would be lacking in mutuality. But I was going to say, here is the situation here: Assuming the transaction to be invalid, could Mr. Green have avoided the deed without offering to do equity? And the heirs here, of course, would be in no better position. My impression is that Mr. Green could not, if he had admitted to be true what Mr. Niday has testified to, title taken in consideration of certain advances to be made, he might say this agreement was void for want of mutuality, no obligation on Mr. Niday to advance any more than a dollar or five dollars or twenty-five dollars, as the case may be, which would be a totally inadequate consideration, hence I want the deed set aside, and Mr. Niday says, "I have already advanced you \$100 on account of it," and Mr. Green says, "Yes, I know that, but that doesn't change the situation." Would a court of equity listen to Mr. Green's plea for relief if he were unwilling to return to Mr. Niday what he received under this voidable instrument? That is the real situation.

MR. MONTGOMERY: I appreciate Your Honor's suggestion there, but I would like to add one thought in connection with that, that insofar as

the heirs are concerned, looking at the question now suggested from the broad viewpoint of the application of principles of equity rather than the technical construction of the immediate transaction: It would undoubtedly have been Mr. Niday's duty at the time Mr. Green made this suggestion to him to say, "If you have six acres of unincumbered land and you have no property of any kind out of which to realize any income, then instead of giving this six acres to me, some effort should be made by you to sell this six acres," especially in view of the fact that at the time, as shown by the undisputed record, he did have \$500 in the bank from which he could draw for various purposes. Furthermore, certainly even counsel for the defendant cannot contend that, taking the witness's own statement that he paid Mr. Green \$2800 for five acres of land,—that is what it is boiled down to, if we take his statement to be true,—Mr. Green gave him six acres, and on that six acres alone he advanced him \$2800. The vice of the position of the defendant, the very fact shows itself that he wasn't dealing with the six acres of land, even though he attempts to so state, but if he did advance \$2800 it must have been in relation to the entire transaction. So it really comes down to the question to what extent the Court, as a court of equity, will take the word of the defendant, when the very circumstances under which it is stated, the lips of the one being sealed by



death, the very circumstances would indicate a diametrically opposite situation, owing to the fact that the now claimed advances of \$2800 were far in advance of the value of the six acres; and it was Mr. Niday's duty when dealing with a client under such a situation to say to Mr. Green, "No, it will not be becoming to me under any situation to take your property which is unincumbered, but I will aid you in getting money on it for your own use." It reverts back again to the original situation presented to Your Honor, that the six acres comes in as an element of the entire transaction, and that even though advances were thereafter made, after the conveyance of the deed, if counsel's statement is true, that it appears from the face of the record that Mr. Green at that immediate time was not destitute of property, and I can see myself no reason for changing the rule and its application with reference to that. I agree with Your Honor that if a specific contract had been made, a reasonable one, if he had said to Mr. Green, "I will give you \$500 for this six acres of land," and he came on the stand and testified that he did, and produced the check, which would be a reasonable compensation possibly for the six acres, so that the contract would look to accord with a reasonable contract, then the suggestion made by Your Honor that of course Mr. Green would be in a position where at least he should turn back the \$500, would be all



right. But when we come to an unreasonable proposition, after the defendant has gone on the stand and reduced the value of the 212 acres down to \$15,000, then to advance an argument that he advanced \$2800 on six acres, wouldn't appeal to the conscience of a court of equity.

MR. FRASER: Counsel seems to think that the generosity of Mr. Niday to his father-in-law in his old age should militate against Mr. Niday. Here was his father-in-law in the latter years of his life, without any property or means of support, and the fact that he advanced more than \$600 should not militate against his claim for reimbursement. He has testified to that consideration for six acres. It was a year before the other deed was given, and unless the Court absolutely refuses to believe the testimony entirely and say that Mr. Green deeded this for some other reason, which the record does not disclose,—I think the Court has stated the rule exactly, that he who comes into a court of equity must come with clean hands. And if Mr. Niday, according to counsel's theory, had refused to advance Mr. Green any more than five or six hundred dollars, it would have been all right for the Court to allow it, but because he did see fit to aid his father-in-law to this extent, therefore he should be denied any return for the moneys he expended. I do not believe that is equity, and I do not believe it is the law. We claim that under the principles

of equity we are entitled to be refunded to the value of that land.

MR. NIDAY: If the Court please and would bear with me just a moment in this matter. Counsel has seen fit here to enter into a dissertation upon propriety. The scene has shifted since the year 1914 and the year 1920 or even 1918. At that time Mr. Green came over here a broke man. As he said himself, he didn't have a dollar or know where the next meal was to come from. Subsequent to that he had a sale on his ranch and got a little bit of money. He owed more than that amount of money that was left. That instead of these other heirs offering to do anything, there wasn't one of them that offered to turn a hand to help him. The testimony so far as that is concerned—this is out of the record—so far as that is concerned, there wasn't one of them contributed a dollar to his support. They did give a little money to Mrs. Wager. And at that time I put it all up. At that time they said Niday was a prince. It is just because of the change of conditions that brings about the condition today. The fact is that at that time they all realized that Mr. Green was a broke man. Because of a change of conditions, property enhancing in value, and the property chancing to be sold at a fabulous price in my judgment, the scenes shifted. As a matter of fact, when I ad-

vanced this money to Mr. Green, if it had been \$10,000 and he had lived long enough to need it, he would have gotten it. Mr. Green knew it and he knew his friends. If he was alive today there would have been a very different atmosphere before this Court. When they say they helped Mr. Green they know it is false, and the man that sits there is one of them too.

THE COURT: No, Mr. Niday; I am indulging you—

I think I will follow the general principle suggested, gentlemen. If you have any doubt—if you require it, Mr. Montgomery, I will direct Mr. Niday to show in detail the disposition of these moneys, that is, for what purposes they were paid out and when and under what circumstances. While there is some merit in your suggestion that it couldn't have been that Mr. Niday paid out \$2800 on account of the consideration for this six acres, still, under all of the circumstances, a part of that might be very well have been paid out by virtue of this agreement. Money might have been paid out by reason of a feeling of kindness or the relationship existing between the two as friends and relatives by marriage. In other words, the first advances might have been on account of the deed, and then the others might have continued. As I say, the record is not very clear upon the subject. If you desire to further inquire into it I will direct Mr.

Niday to produce such papers and books as you want and have a further hearing upon it.

MR. MONTGOMERY: Would that be with reference to the entire \$2800 or the value of the—

THE COURT: Well, there is involved here at present only so much of the \$2800 as would be the value of the six acres of land, because it is understood that this question doesn't extend to the 206 acres at all.

MR. MONTGOMERY: I would like, in connection with that inquiry, if the Court please, to likewise have Mr. Niday produce the records of Mr. Green's dealings at that time with the Satterfield estate, that is, during the entire period of time it now develops that Mr. Green received an income, and if this is going to be allowed against that six acres I think that same inquiry should extend to that, and the deeds that had been given as I understand by Mr. Green.

MR. FRASER: I would ask that that be continued until tomorrow morning. I desire to finish that hearing and permit the witnesses to go back to Denver and Salt Lake that are now here in Boise and before the Public Utilities Commission.

MR. MONTGOMERY: If we could save any time, what would be your opinion if we didn't stop to go through those records as to the value of the six acres at that time, as to what proportion of the \$2800 would apply to that?



MR. FRASER: Just a proportionate value, I suppose, of what the whole ranch sold for.

MR. MONTGOMERY: What would that amount to?

MR. NIDAY: If it comes down to that question—

THE COURT: Proportionately the amount is about \$900; that is, the land was sold for not quite \$150 an acre, as a whole,—between eight and nine hundred dollars.

MR. MONTGOMERY: Then the inquiry—as to seeing if Mr. Green received income from the Satterfield estate. You are asking for a general accounting, and he received moneys in behalf of Mr. Green, that belonged to Mr. Green personally.

MR. NIDAY: Mr. Satterfield sent me a copy of the letter written to Mr. Montgomery: He doesn't state that I have got the record. He states that it was filed with the probate judge. I wrote Mr. Satterfield at once that he was in error about that, that Mr. Green was simply an ancillary administrator, and that the papers had all been forwarded and filed with him, and he was the one that has them.

MR. MONTGOMERY: Where did you get the source of information of the papers you presented to me last time?

MR. NIDAY: I have already testified that I collected them and they came through me. I don't pretend to say now, and didn't any time, as



to how much Mr. Green has got, although I could almost swear that what has been stated here is the amount he got and all he got, but what I say is that these amounts were collected by me, and he has been given credit for them.

MR. MONTGOMERY: What I want is the history of that. It was all in a lump sum.

MR. NIDAY: There are only two items.

MR. MONTGOMERY: Haven't you the original record?

MR. NIDAY: Yes, I have that record, I think.

MR. MONTGOMERY: I would ask only for an inquiry as to the \$900, with the same inquiry as to the receipts. Of course if you credited him with the amount received from the Satterfield estate, all right.

MR. FRASER: That, of course, was accredited.

THE COURT: A proportionate value should be allowed, I think, unless there is some objection to the manner of getting at the value of the land.

MR. MONTGOMERY: I suppose counsel has no objection to the course suggested as to the method of apportioning the value.

MR. NIDAY: If counsel means that the items that I collected for Mr. Green be taken from the total of the moneys I advanced, that is what I mean, and that is, of course, what would be done. I advanced him \$2800 and I collected certain sums, and he would be given credit, of course.

MR. MONTGOMERY: When it comes to the question of figuring, counsel will claim he advanced a certain amount and collected a certain amount. The amount of his advances would be, of course, only the amount left after the collections were subtracted.

MR. FRASER: The only dispute now seems to be that you desire us to take the amount collected from Mr. Satterfield from the \$900.

MR. MONTGOMERY: From the \$2800, and then apportion the balance remaining to the six acres.

MR. FRASER: That would be all right, I guess. It wouldn't amount to very much either way.

MR. MONTGOMERY: I think that would cover every question then, unless there is something else we do not agree about.

MR. NIDAY: There is a question here, if the Court please. When we went to convey this property there was a defect found in the title. I don't know—I presume that is outside the record. There was no testimony given on that matter in the record. And there will have to be an action brought to quiet title. I know the title is defective, and I agreed to bring it. I didn't agree to do it at any time, but it will have to be done.

MR. MONTGOMERY: I suppose that can be taken care of.

MR. FRASER: That was presented to you when you were here before.

MR. MONTGOMERY: When the decree is entered the joint owners can institute the suit. We might agree—

MR. FRASER: I think perhaps we can agree on that.

MR. MONTGOMERY: I don't see why that should go into this accounting.

With that final word as to the accounting, I would like, on behalf of the plaintiff, the record to show an offer of proof on behalf of the plaintiff in connection with the plaintiff's claim presented here this morning for expenses incurred in the institution of the present litigation. I would like to offer to prove in the formal testimony presented by Mr. J. A. Graef that in the various trips from Portland to Boise, Idaho, on behalf of the plaintiff, for the purposes of negotiating settlement of the present case and of conducting the litigation, there has been expended by way of actual outlay the sum of \$413.64, and that there has been presented and paid by the plaintiff to Messrs. Platt & Platt the sum of \$1500 as a reasonable attorney's fee for conducting the present litigation, both of which items are now offered by way of proof in connection with the accounting, as offsets to the claim of the defendant for a commission and fee for expenses in conducting the maintenance and opera-

tion of the property in controversy. And I desire likewise to have the record show a request for an exception to the action of the Court in refusing to allow these items as an element of offset.

MR. FRASER: The record can show that the counsel for the *plaintiff* objects to the allowance of these items as improper and not such items as should be allowed, as shown by the record in this case, and that it would be inequitable to allow the same against the defendant.

THE COURT: The objection is sustained. You may have an exception.

MR. MONTGOMERY: With that, I think we can proceed to the determination of our accounts and the preparation and presentation of the decree.

MR. FRASER: I think so.

MR. MONTGOMERY: I will prepare the decree, if possible, this afternoon, and present it to Your Honor.

THE COURT: You don't desire to go into the matter of the account any further, then?

MR. MONTGOMERY: Not other than as suggested. I presume that can best be determined when I check over Mr. Niday's items.

THE COURT: Yes. I thought perhaps after seeing the books and records and itemized statements you might—



MR. MONTGOMERY: If any further question arises I will ask that it be—

THE COURT: The matter will be continued then until tomorrow morning.

Accordingly the matter was continued until 10 A. M., Tuesday, Nov. 30, 1920.

10 A. M., Tuesday, Nov. 30, 1920.

MR. MONTGOMERY: If the Court please, I do not desire at this time to indulge in unnecessary repetition, but in an involved accounting such as the one here at bar, where our time is so short, we have received the accounts only yesterday, and checked them last evening, and it seems rather difficult to get to a complete understanding of the Court's ruling. And therefore there are two or three isolated items that I desire to present in connection with the Court's ruling, and I think it will probably be more convenient if I present one at a time and determine them as they have arisen.

Before proceeding with such a statement, however, a stipulation has been made between the parties for the purposes of the decree, which I think might properly at this time be presented into the record, to the effect, as I understand it,—and if I am in error you can correct me, Mr. Fraser—that prior to the commencement of this suit and prior to the conveyance of the property involved in this suit, the two sons of R. E. Green, deceased, George L. Green and John M. Green, conveyed to the de-



fendant J. L. Niday all the right, title and interest which they had or have in and to the premises involved, the real property involved in this controversy; which stipulation is made for the purpose of enabling the Court to enter a decree confirming the entire title in the purchasers, rather than the portion. Do I understand, Mr. Fraser—

MR. FRASER: That is all right. It is for the purpose of confirming the title in the purchaser, only.

MR. MONTGOMERY: Now, in view of this stipulation, and for the purposes of preserving the record, I desire at this time to have the record show, in addition to the grounds already presented at the hearing yesterday, a further objection to the allowance of a commission for the sale of the real property involved in this controversy, and interest on such commission, and also to the allowance of a fee for maintenance of the property during the period of time suggested yesterday, upon the ground that it appears now upon the face of the record that at the time when the sale of the real property in controversy was made the defendants J. L. Niday and Mollie Green Niday, his wife, were owners of a paramount title in and to a half interest of the real property involved in this controversy, in addition to the title claimed under the conveyances which have already been set aside.

Now in connection with that objection, the Court will, of course, appreciate that it is really a reiteration of the objection made yesterday, and I presume Your Honor would not care to have any further discussion of that point, other than I might suggest that up until this stage of the proceedings the plaintiff has not been able and was not able upon the trial of the case to establish these conveyances. We alleged on information and belief in the complaint the existence of such conveyances, and assumed, owing to the attitude of the two brothers, that the conveyances had been made; and that was denied by the answer filed in the case, and we were unable to procure any evidence to establish it, although it seemed not altogether material to the merits of the controversy. But I don't know whether Your Honor would consider that that would have an additional bearing upon the propriety of the allowance of a commission or not. From the standpoint of the plaintiff we feel that it does, and I presume Mr. Fraser will claim that it does not.

MR. FRASER: If the Court please—

THE COURT: I don't think I care to hear any discussion.

MR. MONTGOMERY: There was one other stipulation, was there not, Mr. Fraser, that you desired to make in reference to the claims?

MR. FRASER: Yes, but I will put Mr. Niday on the stand. He has the record from the probate court.

MR. MONTGOMERY: Suppose we prove the record before we take up the accounting.

MR. FRASER: Then I would like to have Mr. Niday testify for a moment.

J. L. NIDAY, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION.

By MR. FRASER:

Q. Mr. Niday, in the argument of counsel yesterday he called attention to the fact that in regard to this \$2800 claim which you claim to have against the estate of R. E. Green, that it was a matter which should have been presented to the probate court for allowance. I will ask you if you filed a claim against the estate of R. E. Green for that amount or any amount?

MR. MONTGOMERY: I desire the record to show an objection to this line of inquiry. I didn't know that was the subject you were going into.

MR. FRASER: I desire to have the record show this fact.

MR. MONTGOMERY: The objection will be upon the ground that it has no bearing upon the issues in controversy, and should have been presented as such in that form upon the original trial.

THE COURT: Objection sustained.

MR. FRASER:

Q. Then, Mr. Niday, do you know whether or not notice was given to creditors to present their claims against the estate of R. E. Green, deceased?

MR. MONTGOMERY: To that inquiry I make the same objection already interposed, on the ground that it has no bearing upon the issues in this controversy.

MR. FRASER: If the Court please, I think the records will show that for the reason that this property would belong to the creditors, if this was turned back to Mr. Green it does not belong to the heirs, except after the creditors receive their amounts, and I think the record should show, for the protection of Mr. Niday, that the time has expired now for the parties to come in and file claims.

THE COURT: If that is the only purpose, I assume there will be no objection. It would simply go to confirm the absolute title.

MR. FRASER: The title of the purchasers.

MR. MONTGOMERY: Of course, I assume that that would be a matter within the jurisdiction of the probate court, that is, whatever the statutes might permit. If the statutory time had run, the claims could not be filed. I understood that that would be covered in a different form, by stipulation,



which I was willing to consent to, with one modification.

MR. FRASER: I don't see how it could hurt the defendant any and it might be of benefit.

THE COURT: I don't see how it could hurt anybody or help anybody, because if the time has run as a matter of fact your title is good, and if it hasn't run as a matter of fact the title isn't good, and any adjudication we might make here would probably be without the issues.

MR. FRASER: If the Court please, there is another theory upon which it might be material. The Court has disallowed \$4000 of attorney's fees in this case, and I maintain that the defendant cannot be placed in statu quo by decree of this Court, if that is eliminated, if he were entitled to it, for the reason that when this action was commenced it was too late for Mr. Niday to file a claim against the estate for any attorney's fees, and I believe we have a right to show that fact.

THE COURT: Gentlemen, I don't intend to retry the issues in this case. You had your day in Court, and you have tried the issues, and I don't care to open it up again. Going into some of these questions might affect other considerations.

MR. FRASER: That is all. We take an exception to the ruling of the Court.

(Witness excused.)



MR. MONTGOMERY: Now, yesterday afternoon, after the adjournment, Mr. Niday presented to us, and we re-checked with him, a certain itemized statement of moneys which Mr. Niday claims to have expended on behalf of this real property, together with certain debits which he claims should be allowed. The issue arose in connection with this adjustment as to certain items which might go to constitute the sum of \$900, as suggested yesterday morning, as payment in connection with the first deed, and we agreed,—I think the ruling was, yesterday, as I understood it, that \$900 should be determined, the amount of that money advanced should be determined as of the present date instead of the date of the deed, although I do not know that that question was suggested. It might have been an oversight upon my part. It occurred to me upon reconsideration that the valuation would properly be determinable as of the date the conveyance was given, but Your Honor suggested \$900 yesterday, which was on the basis I think of the present sale valuation. I am not myself exactly clear as to whether Your Honor determined finally the time when that amount should be determined, and I don't know that I presented it. You contend, Mr. Fraser, that it should be determined as of the present date, or the date of the delivery of the deed?

MR. FRASER: We contend, if the Court please, that he made these advances for Mr. Green for this conveyance, and we are entitled to the proportionate value of that six acres as of the balance of the ranch at the time it was sold.

THE COURT: That is really what I had in mind, that it was simply doing equity. However, I gave that particular phase of it no consideration.

MR. MONTGOMERY: I think, as I stop to recall the matter, that possibly I didn't call that to the Court's attention yesterday, and, as I say, on second consideration last evening—

THE COURT: Is it material at the present time to determine that?

MR. MONTGOMERY: It is material only in the sense of determining the amount, is all, if the proportionate value at that time would differ to the extent of two or three hundred dollars.

THE COURT: Would it make any difference as to the result? Would the value of the land be absorbed anyway by the advances? If under one theory they wouldn't be absorbed by any such advances as Mr. Niday made, then of course the question would become material, but if the full value of the land would be absorbed by the advances, I see no reason why it should be taken up.

MR. MONTGOMERY: The only question was, the total of the claims came up, together with eight per cent interest, they aggregated a considerable sum,

leaving a total of something like \$3,000 Your Honor suggested should be provided for in the decree, and it would be simply a matter of reduction of that amount. We have added up the total claims presented, together with the total credits, and the totals, on the theory which we contend, would make a difference of something like \$3000 in favor of Mr. Niday, so there is no total absorbtion of the—

THE COURT: I don't think I follow you. As I understand, this matter of the six acres was a distinct item by itself. After the value of the six acres upon either theory is fully absorbed by the advances made, I don't see how the question is material.

MR. MONTGOMERY: I see Your Honor's point. I do not make myself clear. Mr. Niday has included in the statement of disbursements this item of the \$900, that is, he is charging us \$900, instead of making it a separate item, he simply adds it into the main account, and therefore, it arises purely as a mathematical proposition in connection with the total computation.

THE COURT: Well, I wouldn't approve of that method of accounting. If the advances absorbed the value of that land upon either theory the thing to do is to deduct the price received for this six acres of land from the total charge against Mr. Niday.

MR. MONTGOMERY: On that theory that would—

THE COURT: I assumed that was understood yesterday, gentlemen. I don't know that it makes any difference in the result. In other words, if Mr. Niday got this land upon the consideration that he was to make some indefinite advances, as I said yesterday, the transaction was voidable, but would not be avoided except upon the condition that equity be done, in other words, a reimbursement to Mr. Niday of the moneys he advanced on account of this understanding,—then the plaintiff may take one of two courses; she may either return to Mr. Niday the money he has advanced and take title to the land, or she may say, "the equities in favor of Mr. Niday are so great that there is nothing left, and I don't care to attack the title," and he may continue to hold the title.

MR. MONTGOMERY: As between those two theories I would prefer to have the plaintiff to elect to allow the amount of this to be entered in the total claims presented, because the present mortgage or security outstanding upon the real property, as I understand, embraces the entire 212 acres; that is, when we come to enter our final decree, having agreed to take the securities, the security simply is put up on the theory that the interest and principal will be distributed according to the rights of the parties, and there will be no way of



segregating it to pieces of real property. In order to present that I think the better form would be simply to include it as a claim. As I said yesterday, the difficulty arises in the attempted segregation, insofar as everyone is concerned. I was sincere in my statement. The whole thing has been dealt with as an entity, and insofar as the present security is concerned there would be no way of segregating the six acres.

THE COURT: You must do it either theoretically or actually.

MR. MONTGOMERY: Theoretically we would be doing it in allowing the claim, and Your Honor will see how the question would arise in determining that amount of money, as to what date it should be determined. I think our testimony was that the value at that time was \$20,000, and Mr. Niday's, \$15,000.

THE COURT: Well, gentlemen, I really don't see the difficulty, unless there is some question as to the amount advanced. If you concede, as I understand to be the case, that the land presently or at the time it was sold by Mr. Niday, the six acres, was worth \$900, in other words, that in the total sale he really was to get \$900 for this land, then he is to be credited with that amount, provided his advances, together with interest thereon, would amount to \$900. That would be the only way in which I could do equity to him. In other words,



I am simply saying to you, you must return him the money advanced on this land, together with interest.

MR. MONTGOMERY: I can see Your Honor's suggestion is right. Of course, the only point is that we do not feel, as I suggested yesterday, that under the testimony as presented, the evidence really showed a valid contract to that effect. But that matter was determined adversely to our contention, and I accept the determination. And on the last suggestion I would simply like the record to show that we do not admit or feel like admitting that there was an agreement to advance him or that he actually advanced him that amount of money, with that understanding.

THE COURT: Yes, I understood your position on that, and in that connection I stated to you yesterday that I am not satisfied with the general statement of Mr. Niday upon that point, which was read to me in the record yesterday, about his advancing \$2800, and that you were at liberty to open that question and inquire further of Mr. Niday and examine his books, etc., for the purpose of either satisfying yourself or presenting the matter to me, as to whether he advanced anything on that account, and, if so, how much.

MR. MONTGOMERY: Of course the practical difficulty there is that we have his statement that certain moneys were advanced, and as to this item we took his statement yesterday as to items aggre-

gating the \$900, so on Your Honor's present suggestion of your theory of the allowance of that \$900, the question of the time of determining its value would be automatically eliminated. As to that question we have agreed upon two items, one for rent of the house in which Mr. Green lived, at the sum of \$20 for 29 months, and another item of taxes, which, taking the two together, without going into any detailed statement such as Mr. Niday has heretofore presented, made up, according to his theory, an advance of \$900. That is, he is paid so much a month for the rental of the house in which Mr. Green lived. In that connection another difference arises between us as to what we should be allowed with reference to rental that Mr. Niday received and which went into his possssion in the year 1915. In the original statement submitted to us prior to the institution of this litigation there was attached in the form of certain credits moneys which Mr. Niday had received in the year 1915, on rent for this 212 acres, plus some other incidentals during that period of time, together with certain moneys which he had received from the estate of Taylor and Satterfield. When we came to that question yesterday both Mr. Niday and Mr. Fraser took the position that that had nothing to do with the present controversy, and that that should be considered as having been absorbed in any advances that Mr. Niday may have made. We take the posi-

tion that although that was in the year 1915, according to this—I was going to say according to this, all of these moneys came in prior to the time when the second deed was given, but it seems not; there seems to be some items here following the giving of the deed of Octobr 1st. During the year 1915 this property was rented to a man by the name of Leash. Apparently the dealing was directly with Mr. Niday, regardless of what the record title showed at that time, and he paid Mr. Niday certain rents during that period of time. I can see no theory upon which Mr. Niday should now claim that he does not owe to the heirs the moneys received at that time; and in corroboration of my position, there is contained in his statement of claims an item of \$100, which he says he advanced in the year 1915 to this Mr. Leash. When the item was presented to us yesterday we had a receipt signed by Mr. Leash. I had no way of checking whether it was a cash transaction, but I met Mr. Leash last evening in Nampa, and he explained, which I presume Mr. Niday will agree to, that that was a credit on his rent, that there was no cash transaction between them, and that this item of \$100 which Mr. Niday is charging as cash was simply a credit to Mr. Lesch upon the rent he owed, in lieu of some personal property in the form of a fence which he left upon the property. We don't dispute that item of \$100 if he did advance it and

the property was benefited by it; he would be entitled to collect it. Upon the same theory, that being interwoven with the rents received, it seems to me that these rents are properly chargeable as a credit at this time in favor of those entitled to the real property.

THE COURT: I don't believe I understand the controversy between you there. Is this for the period prior to the execution of the second deed?

MR. MONTGOMERY: Yes, this is for the period of 1915. This was rent received upon the real property which went into the hands of Mr. Niday.

THE COURT: It hadn't been my thought that this account would go back of the date of the deed.

MR. MONTGOMERY: Yes, this is for the period of 1915. This was rent received upon the real property which went into the hands of Mr. Niday.

THE COURT: It hadn't been my thought that this account would go back of the date of the deed.

MR. MONTGOMERY: My position would have been throughout the case that the account would not antedate the deed, that we weren't having a general accounting, other than the question came up yesterday in connection with this subject of personal advances in relation to this other deed.

THE COURT: We didn't go back of the other deed for an accounting, so far as that deed is concerned.



MR. MONTGOMERY: Not exactly back of it, but it put a little different aspect on our position with reference to that deed.

THE COURT: I can't see, gentlemen, how I can go back of the deed transactions. Now it is true that in the original opinion I considered the two together. I had overlooked this statement about the advance of the \$2800, and apparently it was a very brief and general statement; but if you are going into a general accounting, in other words, if you are going back of the deed in each transaction so far as that transaction is concerned, and going into the general relations between Mr. Niday and Mr. Green, then of course we shall have to examine both sides of the account and would have to strike a general balance. That would open up the whole question of what is due Mr. Niday from Mr. Green, and I expressly limited his claim against this six acres, or expressly limited his advances to the matter of the six acres. Now if you are going back of this second deed for an accounting, evidently you will have to open the door for both sides.

MR. MONTGOMERY: I see the Court's point. I merely suggest in that particular that there would exist in my mind a distinction between an accounting relating to personal advances and an account which might deal directly with the question of the maintenance of the real property, that is, if moneys were received at that time which should have been



used in the maintenance of the real property, rather than to indulge in the transactions which took place in this case, it would have been unnecessary, for instance, to give the first deed, if the income being received here was sufficient to maintain that property.

THE COURT: But an advance by Mr. Niday or a receipt by Mr. Niday relating to the land prior to the deed would have no more relation to the cause of action involved in this suit than something relating to property in another state or other personal affairs of Mr. Green. Up to the time of the execution of this deed there wasn't any cause of action at all.

MR. MONTGOMERY: That is correct.

THE COURT: While it may have related to the land, it didn't relate to the cause of action in controversy, and it was no more distinct—it wasn't a distinct thing at that time. Mr. Niday may have advanced Mr. Green money to take care of the land, he might have advanced him money to take care of his home in Nampa, or to buy clothing or food or anything else. It would all be upon the same footing. It would be simply a general account, for which he could assert a claim. On the other hand, if Mr. Green paid him it wouldn't make any difference from what source the money came, until the deed was executed. Then in trying to do equity we cast up the account on both sides. If that is the point, I think I shall have to decline to—

MR. MONTGOMERY: I take it, of necessity, then, any claim which Mr. Niday may have here which is interwoven with these same rents would necessarily be denied.

THE COURT: Unless it has to do with caring for the land and the maintenance of it.

MR. MONTGOMERY: I mean this arose out of the rent, that is, this \$100 was an amount of money received by Mr. Niday and deducted from the rents.

MR. NIDAY: If the Court please, we dispute that as being a fact at all. As a matter of fact that \$100 rose out of the lease rent merely in this way—

THE COURT: Before you proceed—this is after you took the deed?

MR. NIDAY: Yes, after I took the last deed.

THE COURT: Mr. Lesch was a lessee under you?

MR. NIDAY: No; he was a lessee under Mr. Green, but before the termination of his lease the property was conveyed to me; then subsequent to that time Mr. Lesch came to me and he says, "I have three hundred and some odd feet of woven wire that was put in there on this farm under my lease from Mr. Green," and he says, "I would like to sell it to you rather than take it away," and he knew that I would purchase it, and so I bought it from Mr. Lesch and showed them the receipt.

MR. MONTGOMERY: Did you pay cash for it?

MR. NIDAY: I paid cash for it, yes.

MR. MONTGOMERY: You dispute Mr. Lesch on that?

MR. NIDAY: I dispute Mr. Lesch on that.

MR. FRASER: I can't see how it is material. the \$2800 account of Mr. Niday shows far more than enough to take care of the \$900.

THE COURT: This is another matter. This refers to the second deed, the larger deed.

MR. NIDAY: Yes, Your Honor.

MR. MONTGOMERY: How was that paid?

MR. NIDAY: I think I can find the check. Of course that was some time ago.

MR. MONTGOMERY: Of course if you have a check that you paid him, actual cash—we have no way of checking it back, except from the original sources, and he states that it was taken from the rent. That eliminates that question, if you have the check. Now, there is another item here.

THE COURT: It is probable that if Mr. Niday keeps his checks and stubs he can verify his recollection.

MR. MONTGOMERY: December 4, 1915, at the time when I assume he was continuing under the lease from Mr. Green, December 4, 1915.

THE COURT: What is the item?

MR. MONTGOMERY: \$100 for buying his fence.

THE COURT: That is the matter we have been discussing.

MR. MONTGOMERY: Yes; I say the lessee claims it was deducted out of the rent, and Mr. Niday says he paid cash.

THE COURT: Then it is just a question of what is the fact.

MR. MONTGOMERY: Yes. There was no voucher produced yesterday. So I assume if it was deducted out of the rent we would be entitled to have it eliminated.

THE COURT: Yes.

MR. MONTGOMERY: There is a claim of \$291.02, June 19, 1915, for water tax assessed, now being charged against this 212 acres. I understand, Mr. Niday, from the occupant of the premises, that that water was used on more than the 212 acres. Is that correct?

MR. NIDAY: No, this water wasn't. I showed you in those tax receipts that it was segregated.

MR. MONTGOMERY: But Mr. Lesch told me he paid this water rent and the same was taken out of your rent, and it was used not entirely on the 212 acres, but on the 312, one hundred in addition to the 212.

MR. NIDAY: That isn't so. I showed you the receipts yesterday.

MR. MONTGOMERY: You showed me the receipts, but the receipts just speak in general terms.

MR. NIDAY: The receipts describe the property it is assessed against.

MR. MONTGOMERY: On that question I will have to ask to take evidence, because the occupant of the premises says that the water was not confined to this 212 acres, although paid in the name of Greenhurst. The entire property was assessed to Greenhurst.

MR. NIDAY: I am surprised, Mr. Montgomery, because we compared the description there. It is a particular part of this property that this was applied to. I think what is confusing Mr. Montgomery is that Mr. Lesch did have a tract of land just across the road, that went to Mr. Moore, under a lease from Mr. Moore.

MR. MONTGOMERY: Mr. Green hadn't sold it at that time, had he?

MR. NIDAY: Yes; and of course that was paid also, but it is a separate description and a separate assessment, and Mr. Montgomery's attention was called particularly to the description, and he had his abstract to compare it with, so it applied only to what we have been calling Greenhurst proper.

MR. MONTGOMERY: That again is a question of fact.

MR. NIDAY: That can readily be determined from the receipts which I have.



MR. MONTGOMERY: The receipts might not show the distribution of the water.

MR. FRASER: He might take water belonging to Greenhurst and use it on some other land. That wouldn't affect it.

THE COURT: It ought to be very easy to reach a positive conclusion.

MR. MONTGOMERY: Yes; I will verify that. I assumed there would be no dispute. I took the lessee's statement; I had no other means of verifying it. I think that concludes all the differences.

Now do you want any further stipulation with reference to those claims that you suggested yesterday? I agreed to make a stipulation, yesterday.

MR. NIDAY: Well, you objected to it.

MR. MONTGOMERY: I objected to your method of inquiry.

MR. NIDAY: I don't care anything about it now.

MR. MONTGOMERY: I will agree that those claims not be filed, although I would like to suggest in that particular, on learning from Mrs. Niday yesterday that out of the \$500, including this, letter, which we investigated, it was not carried in Mr. Green's name, but in her name, to conceal it, as she stated, from creditors. On behalf of the plaintiff, if you will produce any of those creditors from whom that \$500 was concealed at that time, we

would like, in the name of the plaintiff, to make them compensation, if they were unsecured creditors at that time.

MR. NIDAY: They have all been paid. It was only a question of getting time to pay them, was all.

MR. MONTGOMERY: I think that covers all the items that were in dispute. That leaves only two questions of fact to be determined, the question of the \$100 and the distribution of the—

MR. FRASER: Can we have that at two o'clock this afternoon or later?

MR. MONTGOMERY: Have you got any other record, showing the distribution of the water, what became of it?

MR. NIDAY: The assessment shows for itself. We can't change it. It is a matter of public record. This land is assessed for certain water; there is a certain amount of assessment against that land every year, and it has got to be paid.

THE COURT: It could be verified from the books of the company. Where are those kept?

MR. MONTGOMERY: Kept in Nampa.

MR. FRASER: We can produce the receipt signed by the proper official of the company.

MR. MONTGOMERY: This water tax assessment appears to be for June, 1915, prior to the time you got the deed of October. Was that paid out in cash by you or deducted from Mr. Lesch's rent?

MR. NIDAY: It is my recollection that it was paid out in cash by me.

MR. MONTGOMERY: He claims to me that he paid it at the water office, under your direction, and then it was deducted from his rent.

MR. NIDAY: I think where this confusion arises, if the Court please, as I remember it at that time the Nampa & Meridian Irrigation District had what they call a toll charge that was paid before they turned on the water; then they had the regular assessment charge, that was paid twice a year, and that Mr. Lesch paid the toll charge; I think that was it.

MR. MONTGOMERY: Well, if he paid this water charge himself and then it was deducted from the rent, you have no objection to excluding it—

MR. FRASER: The toll charge is not that charge.

MR. MONTGOMERY: I am talking about that item.

MR. NIDAY: Mr. Lesch doubtless misunderstands. There was a toll charge at that time, that the district wouldn't turn on the water until the toll charge was paid. Then, in addition, they levied a regular assessment, and that was in the form of a tax.

MR. MONTGOMERY: My question is, if Mr. Lesch deducted this from the rent he owed Mr. Green, you will agree to eliminate it?

MR. NIDAY: Oh, certainly; that is to say, if that has been charged in this account as a setoff, of course it should be deducted.

MR. MONTGOMERY: It is at the top of this sheet here.

MR. NIDAY: It might be in the question of the rents on this general statement, because that shows the credits that Mr. Green got on any rents that came into my hands, and it shows a credit there of \$300,—let's see,—there is three hundred and three hundred, is six hundred, one hundred is seven hundred, and a hundred and sixty-two is eight hundred and sixty-two, and fifty, is practically nine hundred dollars, and the two hundred that I showed you the statement for, where the rent was deducted makes the eleven hundred or eleven ten. So you see he is getting full credit for the rent for that year. That was the amount of the rent for that year, and that is given as a credit.

MR. MONTGOMERY: Those items you claim have been eliminated from the case, those items you have just read are the ones the Court passed upon this morning.

MR. NIDAY: I don't understand, if the Court please, that they have been eliminated. I understand that I was merely to have a credit there of \$900. As a matter of fact this was kept as an account, moneys advanced and moneys received. The moneys received, of course, were Mr. Green's



moneys; they were delivered to him when he wanted them; and the moneys advanced, other than that,—the difference, rather, between the moneys received and the moneys advanced was the balance due me, which amounted to something like \$1450. That is the way the account was kept regularly.

MR. MOTGOMERY: I don't follow counsel's position there myself. He is putting in \$200 as a—claiming that he paid that out; he is charging us \$201.09, together with eight per cent interest, for moneys advanced by him on June 19, 1915, in the payment of water assessment. Now—

THE COURT: What is the date of the second deed?

MR. MONTGOMERY: The second deed is October 1, 1915, just six months before the—

THE COURT: Why do you make such a charge as that, Mr. Fraser, against this \$30,000, the \$30,000 received for the land? Eliminating the \$900 for the six acres, then there would be \$29,100 chargeable against Mr. Niday. Now you credit him with what he has paid out on account of the land since he got his deed, but how do you go back before the deed and take credit for this \$200?

MR. FRASER: Mr. Niday can explain that, if the Court please.

THE COURT: Very well. You understand I am not asking you about the six acres, because we are eliminating that. But I don't see how un-



der the rule that you contend for here, and that I have recognized, how you can go back of the deed and claim any credit. I am not charging you with anything back of the deed.

MR. NIDAY: I am inclined to think, if the Court please—

MR. FRASER: What item have you reference to?

MR. MONTGOMERY: There are the first five items there—September the fourth—the first four are all items paid prior to the execution of the deed.

MR. NIDAY: The one of December 31st—

MR. MONTGOMERY: That is eliminated. That was the taxes for 1915, paid on December 31st, but it accrued before you purchased.

MR. NIDAY: Well, I don't know; I would have to look that up.

THE COURT: He would be entitled to a credit for that item.

MR. NIDAY: I wouldn't be entitled to it, Your Honor, unless it were paid. Those taxes were paid in two payments and the 1915 tax would not be paid until June, 1916.

THE COURT: Half of them would become payable in the latter half of December.

MR. NIDAY: Well, if the Court please—

MR. MONTGOMERY: Yes, half of it would be payable in December of that year, and the other

half in June or July following. Your own statement shows that it was paid in June, 1915.

MR. NIDAY: That is the question, whether it was the year it belonged to or the year it accrued. I will have to determine that. You had it before you yesterday and you didn't raise the question.

MR. MONTGOMERY: I didn't have a chance to check these over.

THE COURT: What is the date of this item for taxes?

MR. MONTGOMERY: June 19, 1915, and the interest on that was figured from that date.

THE COURT: It is highly probable that that is a payment for the second half of the taxes for 1914.

MR. NIDAY: It is possible it might have been a payment I made for Mr. Green.

THE COURT: And of course if that is the case that would have to be eliminated.

MR. FRASER: If it is eliminated, of course we take an exception. Our position is that if Mr. Green were here he would not only have to pay the amounts the Court now holds, but all the moneys he has advanced.

THE COURT: I am willing to allow you everything that you have paid out on account of the land in preserving it and caring for it and handling it since you took the deed, but I will not allow you

credits for any general claims which you might have against Mr. Green.

MR. MONTGOMERY: There is another item, July 2, 1915, for the 1914 assessment.

MR. NIDAY: That would be in the same category.

MR. MONTGOMERY: With those two eliminations. What was that one-half water storage paid September 8, 1915? Was that for 1914? And you figure interest from that date.

MR. NIDAY: Well, I don't know only what it shows here.

MR. MONTGOMERY: This is your own statement, made up.

MR. NIDAY: You have got it before you.

MR. MONTGOMERY: Then let us agree to eliminate it.

MR. NIDAY: All I would say is that I would have to look it up before I would know.

MR. MONTGOMERY: That settles all the claims, if the Court please, unless you want to look that up first.

MR. FRASER: In the case of taxes, if the Court please, it rather occurs to me that we would be subrogated to the rights of the county in the matter of those taxes, under the general presumption of equity that they are a little different from a claim against Mr. Green or his estate.

THE COURT: That would depend upon when they were paid, the taxes for what year. In order that there may be no misunderstanding, gentlemen, I have already stated that I am willing to allow you reimbursement or credit for any thing you paid out on account of the land after you took the deed. I am excluding items of any general nature that Mr. Niday may have had with Mr. Green, because no such issue was presented in the pleadings. And there is no evidence to the effect that there was any understanding that the land was conveyed to Mr. Niday in consideration of any money Mr. Green may have owed him, but upon the other hand Mr. Niday's statement is to the effect that there was no such understanding. As to this particular item, if Mr. Niday merely in his general dealing with Mr. Green, of advancing money to him from time to time as needed, and receiving money belonging to Mr. Green, and crediting him with it, in other words, keeping a general account with him, if, in June, 1915, three or four months before the deed was executed, before there was any understanding that the deed should be executed, simply paid these taxes as one of the items of this business relationship, and charged it up to Mr. Green in a general account, I can't see that it has any higher standing in equity than any other advance he may have made. If upon the other hand a tax lien attached to the land for the taxes in 1915, that is, attached

as of January, 1915, and conveyance wasn't made until October, and after the conveyance was made Mr. Niday discharged that lien by paying the taxes for 1915, then he is entitled to credit for such payment.

MR. MONTGOMERY: Now, Mr. Niday, each one of these items was checked, as you suggested, yesterday, with your receipts, and I checked the interest dates with you and agreed with you insofar as the dates are concerned, so you had looked it up. You had your receipts there when you presented this statement.

MR. NIDAY: The only thing that makes me think there is something wrong with that is that there is nothing to show here that the last half of the taxes for 1915 or the water assessments for 1915 were paid in 1916, which I am confident was done, and I will state—

THE COURT: You say the taxes—the general taxes?

MR. NIDAY: Both the general taxes and the water assessments.

THE COURT: It is almost impossible to see why you should have entered a date there of June unless it be for the last half of taxes for 1914, because no taxes for 1915 would become due at that date.

MR. NIDAY: That is why I am inclined to think it was an error. I am inclined to think it was



paid in 1916, and for some reason I put it under that year by mistake, because this is all arranged by years. There is nothing here to show that the last half of the 1915 has been paid at all, and I am very confident about it.

THE COURT: Well, it will only take you a few minutes—

MR. NIDAY: Yes, we can look that up, and I presume it will be no trouble to determine that from our receipts.

MR. FRASER: We will look them up and see.

THE COURT: Is there anything else, gentlemen?

MR. MONTGOMERY: Nothing else. I think that covers all questions in dispute. I will dictate a decree. It is simply a matter now of determining the difference between these two amounts.

Just one thing further. As I understand you now, Mr. Niday, after eliminating these disputed questions of credit, you intend to make a total, or Mr. Fraser will, of the claims in this statement, and hand it to us, total the credits which you have presented, to which we agreed yesterday, and subtract the two and charge one-half to us. I don't want a dispute as to the method of computation.

MR. FRASER: I guess we can arrive at it by computing it all right.

MR. MONTGOMERY: If we can't, I would rather have the Court determine that. We seem to

be unable to agree when we get together as to what has been done or said, and I don't like to come back with another question. In order that the Court may understand my position: We have a statement here of claims submitted, and against that is a statement of credits. As I understand it, take the total of the claims presented and the credits presented, and take the difference, and divide that by two?

THE COURT: The plaintiff now represents one-half.

MR. MONTGOMERY: One-half of the property.

THE COURT: Mr. Niday holds the other half.

MR. MONTGOMERY: Yes.

THE COURT: I can't see how there would be any question about it.

MR. MONTGOMERY. I don't, myself, but the only reason I suggest it, we seem to have a little difficulty about minor propositions, and I don't like to come back.

MR. FRASER: There is another matter in the case. I don't know very much about it, and yet it may be very material, where they make this settlement that they pay one-half. There is the interest of Mrs. Niday in this estate that is yet unaccounted for so far as we know. In other words, Mrs. Niday is not contributing to Mr. Niday her share of the moneys which she advanced on Green-

hurst and taxes and everything else on this matter. Mrs. Niday is an heir and Mr. Niday is not. In other words, in this decree Mrs. Niday is entitled to a proportionate interest in this estate.

THE COURT: Is she a party to the suit?

MR. MONTGOMERY: Yes.

MR. FRASER: I don't care to take the time of the Court in that now. I am just suggesting it.

MR. MONTGOMERY: If you have a suggestion of that kind, I would suggest that you present it and determine it. I have really got to get back to Portland tomorrow morning, and I would like to get some definite understanding and not keep returning to the Court. Is that a claim you want to present?

MR. FRASER: I say nothing about it. I simply make the statement that we don't consider we are in statu quo in this procedure.

THE COURT: Mr. Fraser, the Court will very readily put you in statu quo, if you want to be put in. You appear for Mrs. Niday as well as Mr. Niday?

MR. FRASER: I will say to the Court that in thinking the matter over the question struck me as to how this interest of Mrs. Niday's could be taken care of.

THE COURT: Mr. Niday has that interest, hasn't he?

MR. FRASER: No, he has not her interest.

THE COURT: She is not asking that the decree be set aside as to her?

MR. FRASER: No, she is not asking anything. I just say the matter occurred to me, and I had no solution for it myself. I will be frank to say I don't know just exactly what should be done.

THE COURT: I would say that the decree might be made in such way as to cut off her interest. She is made a party to the suit.

MR. FRASER: I will say I don't think it is very material in the matter, but it is just a matter that occurred to me in regard to it.

MR. MONTGOMERY: If the Court please, I will make the suggestion,—Mrs. Niday joined in the deed with Mr. Niday to these purchasers, conveying, as I understand, all her interest. The decree of this Court sets aside the two conveyances, or will set aside, when drawn, the two conveyances from Mr. Green to Mr. Niday, but Mr. Niday and Mr. Fraser, representing not only Mr. and Mrs. Niday, but these purchasers, have come in here on behalf of the purchasers, and asserted a claim of innocent purchaser for value, that is, they took from Mrs. Niday and Mr. Niday their interest in the property, not knowing at the time they took it that there were outstanding claims. That was really an issue in the case, and was eliminated by stipulation of the parties. From the standpoint of



the record the decree will confirm in these purchasers the interest of the plaintiff, and likewise, under the stipulation this morning, the interests of the two brothers, and at the same time there has been introduced in evidence the deed showing the conveyance of Mrs. Niday's interest to these purchasers, and these same people are here representing and protecting those very purchasers; in fact Mr. Niday has given them a warranty deed, telling them it is a perfect title. While the chain of conveyance has been broken, the title is vested in them, and it seems to me that under the decree and the record as it now stands they have procured the interests of all. I am at a loss to understand what counsel suggests.

THE COURT: There is no question about that. Mr. Fraser raises a question between Mr. and Mrs. Niday, and Mr. Niday is getting the worst of it. Now if it is wholly unnecessary and if Mr. Niday doesn't want the worst of it from his wife, he may have a decree confirming in him what would otherwise be the interest of Mrs. Niday. In other words, it would simply give him all that he supposed he had.

MR. MONTGOMERY: No, there is no question about that.

MR. FRASER: I didn't raise the question at this time for the purpose of taking any advantage of it at this late time.



THE COURT: You represent both of these parties here, Mr. Fraser.

MR. FRASER: That would be perfectly satisfactory, to have the decree confirm the title in Mr. Niday so far as her interest is concerned.

MR. MONTGOMERY: That will be perfectly satisfactory to us.

THE COURT: Very well.

MR. NIDAY: I don't see how that is material

THE COURT: She is stopped from questioning his title. It is just a matter as to who owns these securities now, that is, the other half interest. The plaintiff gets a half interest, and you will have the whole of the other half interest unless you want to—I suppose the plaintiff is entirely neutral on that subject. As between Mr. and Mrs. Niday the decree may go any way you desire.

MR. FRASER: I suggest that you confirm her right, title and interest.

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The above and foregoing statement is hereby settled and allowed as the statement on cross appeal of the plaintiff, Julia Green Graef, in the above entitled action.

FRANK S. DIETRICH,

*Judge.*

Endorsed: Filed Aug. 11, 1921.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

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ORDER DIRECTING DELIVERY OF TENDER.

To W. D. McREYNOLDS, Clerk of the above entitled Court:—

You are hereby authorized to deliver to J. L. Niday, the above named defendant, or to any depository named by the above entitled Court, those certain checks, one in the sum of \$4,313.47, and the other in the sum of \$49.66, which were delivered to you by the plaintiff on the 14th day of February, 1921.

Said amounts being a tender made to the defendant, J. L. Niday, in accordance with the interlocutory decree in the above entitled Court, heretofore entered in the above entitled cause, and you are fully authorized to make whatsoever disposition of said sums of money as shall be required by the final decree in the above entitled Court, in the above entitled case, but such payment to the said J. L. Niday is made under protest and subject to the following objections:

That said sum of \$4,313.47, and said sum of \$49.66, so tendered to the said J. L. Niday, in accordance with the interlocutory decree of the above entitled Court, include profits made by the defendant J. L. Niday, out of the handling of the real property involved in the above entitled cause, the title to which real property was procured by the said J. L. Niday through undue influence, and upon the

further ground that said J. L. Niday took the title to said real property in trust and has since the date of so doing procured the title to said real property by purchasing in his own right from some of the heirs of R. E. Green, deceased, certain interests in said real property, and has not been compelled to account to the plaintiff above named, or any of the heirs of R. E. Green, deceased, for the profits, if any made out of said purchases, and upon the further ground that said plaintiff is being required to make said tender and payment before the entry of any final decree in the above entitled cause, and without any right to appeal from the order of said Court requiring such payment and tender.

PLATT & PLATT,

MONTGOMERY & FALES,

*Attorneys for Plaintiff.*

Boise, Feby. 26th, 1921.

Received of W. D. McReynolds, Clerk, the check and draft mentioned in the above authorization.

J. L. NIDAY,

By ALFRED A. FRASER,

*His Attorney.*

Endorsed: Filed Feb. 19, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

Form of decree proposed by cross appellant.

This cause came on to be heard at the September term, 1920, and was further heard at the Feb-

ruary term, 1921, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows: viz:

(1) That that certain deed bearing date the 22nd day of December, 1914, recorded on the 19th day of February, 1916, in Book 75, page 13, of the Deed Records of the County of Canyon, State of Idaho, from R. E. Green, a widower, to J. L. Niday, conveying the following described real property, to-wit:

That part of the northeast quarter of the northwest quarter of Section 6, in Township 2 North, Range 1 west of Boise Base and Meridian, lying north and east of the right-of-way of the Oregon Short Line Railway Company, containing six acres of land, more or less, situated in Canyon County, State of Idaho; together with the ditches and ditch rights, and a water right consisting of four miners inches of the waters of what is commonly called the Ridenbaugh canal, owned by the Nampa and Meridian Irrigation District, under the rules and regulations thereof, be, and the same is, hereby set aside and held for naught.

(2) And that said deed bearing date, the 1st day of October, 1915, from R. E. Green, a widower, to J. L. Niday, recorded on the 27th day of May, 1916, in Book 74, page 253, of the Deed Records of Canyon County, State of Idaho, conveying the following described real property, to-wit:—

The southeast quarter of the northwest quarter and lots numbered 2 and 3, and all that part of lot numbered 4 lying north and east



of the right-of-way of the Oregon Short Line Railway Company, and the east half of the southwest quarter, except about three acres heretofore deeded to the Nampa & Meridian Irrigation District, all in Section 31, Township 3 north, Range 1 west, Boise Base and Meridian, containing 206 acres, more or less; together with the water rights, ditches and ditch rights thereunto belonging or in any wise appertaining.

be, and the same is, hereby set aside and held for naught.

(3) That all of the right, title and interest of the plaintiff above named, and of her assignors, Philo F. Green and Gratia K. Acuff, in and to the above described real property, and all of the right, title and interest of George L. Green and John M. Green, assignors of the defendant J. L. Niday, and all of the right, title and interest of the defendant J. L. Niday and Mollie Green Niday, his wife, in and to the above described real property, be, and the same is, hereby forever quieted and confirmed in the defendants George A. Buell and Effie Ada Buell, his wife, and A. L. Green.

(4) That the sum of \$4,313.47, together with interest thereon from December 23, 1920, to February 14, 1921, has this day been tendered and paid to the defendant J. L. Niday, in accordance with the interlocutory decree of this Court and in accordance with the stipulation of the parties.

(5) That the defendant J. L. Niday is hereby declared to be a trustee of the proceeds arising



from the sale of the above described real property, and is hereby ordered to account to the plaintiff for all profits made by him out of the handling of said real property since the 22nd day of December, 1914, including any profits made by the said J. L. Niday in purchasing the interests of George L. Green and John M. Green, the sons of R. E. Green, deceased, and reselling the said interests to George A. Buell, and Effie Ada Buell, his wife, and A. L. Green, and pay to the plaintiff one-half of said profits.

(6) That the defendants J. L. Niday and Mollie Green Niday, his wife, shall, within five days from the date of this decree, execute and deliver to the plaintiff an assignment of an undivided one-half interest in and to that certain mortgage bearing date, the 14th day of December, 1918, and recorded in Book 70, page 297, of the Mortgage Records of Canyon County, Idaho, from A. L. Green, a bachelor, and George A. Buell and Effie Ada Buell, his wife, to J. L. Niday, covering the above described real property, and endorse the note secured thereby, and deliver said mortgage, together with said assignment of mortgage and said note so endorsed, to the Boise City National Bank, of Boise, Idaho.

(7) That the defendant, J. L. Niday shall, within five days from the date of this decree, deposit with the Boise City National Bank, all interest collected by him on the said note and mortgage since the 1st day of December, 1920.

(8) That the said Boise City National Bank, of Boise, Idaho, shall collect the interest and principal of said note and mortgage at all times when due, and pay the same or any portion thereof when so collected, together with all interest collected by said J. L. Niday on said note and mortgage since December 1, 1920, in the following manner: One-half of such principal and interest to the plaintiff Julia Green Graef, and one-half thereof to the defendant, J. L. Niday. And upon the failure of the said J. L. Niday to so execute said assignment of an undivided one-half interest in and to said mortgage and endorse said note secured thereby and deposit said note and mortgage in the said depository, the Boise City National Bank, of Boise, Idaho, then this decree shall stand as and for an assignment to the plaintiff of an undivided one-half interest in and to said note and mortgage.

(9) That plaintiff have and recover of and from defendant, J. L. Niday, her costs and disbursements herein, taxed and allowed at \$.....

Dated this..... day of February, 1921.

.....  
*Judge.*

Endorsed: Filed Feby. 21, 1921.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

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 PETITION FOR APPEAL.

By Cross-Appellant.

The above named plaintiff, conceiving herself aggrieved by the final order and decree of accounting made and entered in the above entitled cause on the 26th day of February, 1921, does hereby appeal from said final order and decree to the United States Circuit Court of Appeals for the Ninth Judicial Circuit for the reasons specified in the Assignment of Errors, which is filed herewith, and she prays that this appeal may be allowed, and that a transcript of the record, papers, and proceedings and all things concerning the same, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit upon her filing a bond for the payment of all damages and costs if she fails to prosecute the said appeal to effect, which bond shall act as a super-sedeas bond.

JULIA GREEN GRAEF,

By PLATT &amp; PLATT,

MONTGOMERY &amp; FALES,

*Solicitors for Plaintiff.*

HUGH MONTGOMERY,

*Of Counsel.*

UNITED STATES OF AMERICA, )

) ss.

District of Oregon, )

I, Hugh Montgomery, one of the solicitors for the appellant, hereby certify that I have prepared a copy of the Petition for Appeal in the within case, certified to by me as such, and have placed the same in a sealed envelope, addressed to A. A. Fraser, solicitor for the defendants and appellees, at his place of business in Boise, Idaho, with postage thereon prepaid, and deposited the same in the United States mail.

HIGH MONTGOMERY,  
*Solicitor for Appellant.*

July 15, 1921.

Endorsed: Filed July 18, 1921.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

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ORDER ALLOWING APPEAL.

To Cross-Appellant.

This day came Julia Green Graef, plaintiff, appearing by Messrs. Platt & Platt, Montgomery & Fales, her solicitors of record, and presented her petition for an appeal and an assignment of errors accompanying the same, which petition, upon consideration of the Court, is hereby allowed, and the Court allows an appeal for the Ninth Judicial Circuit upon the filing of a bond in the sum of One Thousand (\$1,000.00) Dollars with good and sufficient surety to be approved by the Court; and

FRANK S. DIETRICH,  
*Judge.*

UNITED STATES OF AMERICA, )  
 ) ss.  
 District of Oregon, )

HUGH MONTGOMERY,  
*Solicitor for Appellant.*

By Pearl E. Zanger, Deputy.



(Title of Court and Cause.)

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ASSIGNMENT OF ERRORS.

Of Cross-Appellant.

Now, on this 15th day of July, 1921, comes the above named plaintiff, Julia Green Graef, appearing by Messrs. Platt & Platt, Montgomery & Fales, her solicitors of record, and says, that in the record and proceedings of the above entitled Court in the above entitled cause and in the final order and decree entered thereon on the 26th day of February, 1921, there is manifest error, and that said order and decree is erroneous and against the just rights of said plaintiff and for error the said plaintiff assigns the following:

I.

Because the above entitled Court erred in refusing to declare void the conveyances from R. E. Green, deceased, to J. L. Niday, which conveyances are more particularly described in the interlocutory decree entered by the above entitled Court on the 23rd day of December, 1920, and in refusing to enter a final decree setting aside said conveyances and in refusing to enter the form of decree requested by the plaintiff in the above entitled action.

II.

Because the above entitled Court erred in allowing to the defendant J. L. Niday the sum of Nine Hundred (\$900.00) Dollars as a credit for money alleged to have been advanced to R. E. Green, de-

ceased, in connection with the deed of Decembr 22, 1914, more particularly described in the interlocutory decree entered by the above entitled Court in the above entitled cause.

### III.

Because the above entitled Court erred in awarding to the defendant J. L. Niday the sum of Nine Hundred (\$900.00) Dollars as an allowance for personal services in supervising the lands described in the deeds from R. E. Green, deceased, to J. L. Niday more particularly described in the interlocutory decree entered by the above entitled Court in the above entitled cause.

### IV.

Because the above entitled Court erred in awarding to the defendant J. L. Niday the sum of Fifteen Hundred (\$1500.00) Dollars as a commission for selling the real property described in the deeds from R. E. Green, deceased, to the said J. L. Niday more particularly described in the interlocutory decree entered by the above entitled Court in the above entitled cause.

### V.

Because the above entitled Court erred in awarding to the defendant J. L. Niday interest at the rate of eight (8%) per cent per annum on all moneys advanced by him in connection with the maintenance and care of the real property described in the deeds from R. E. Green, deceased,

to J. L. Niday more particularly set forth in the interlocutory decree of the Court filed in the above entitled action, which interest was allowed from the respective dates of said advancements to the date of the final decree entered in the above entitled Court, and which interest was also allowed on the total amount of moneys held to be due from the plaintiff to the defendant J. L. Niday from the date of the final decree of the Court until the payment of the same, for the reason that no interest should be allowed on such advancements and for the further reason that the rate of interest actually allowed was one (1%) per cent in excess of the statutory rate provided for by the statutes of the State of Idaho.

## VI.

The Court erred in allowing to the defendant J. L. Niday the full sum of Four Thousand, Three Hundred Thirteen Dollars and Forty-seven Cents (\$4,313.47) and in requiring the plaintiff to deposit said sum of money before entering a final decree and final order of accounting from which the plaintiff could appeal.

## VII.

Because the above entitled Court erred in refusing to award to the plaintiff the amount of the actual expenses incurred by her in maintaining the above entitled cause to set aside the deeds from R. E. Green, deceased, to the defendant J. L. Niday

more particularly described in the interlocutory decree entered by the Court in the above entitled cause.

### VIII.

Because the above entitled Court erred in requiring the plaintiff to deposit to the credit of the said J. L. Niday the sum of Four Thousand, Three Hundred Thirteen Dollars and Forty-seven Cents (\$4,313.47) as a condition precedent to the entry of the final decree under penalty of a dismissal of said suit with prejudice in the absence of such tender.

### IX.

Because the above entitled Court erred in allowing to the defendant J. L. Niday any profit or instrument arising out of the possession, maintenance or sale of the real property described in the deeds from R. E. Green, deceased, and J. L. Niday more particularly set forth in the interlocutory decree of the Court entered in the above entitled cause, the validity of which deeds, under the decision of the above entitled Court in the above entitled cause, could not be sustained on any theory or explanation.

PLATT & PLATT,  
MONTGOMERY & FALES,  
*Solicitors for Plaintiff.*

HUGH MONTGOMERY,  
*Of Counsel.*

UNITED STATES OF AMERICA, )  
 ) ss.  
 District of Oregon, )

I, Hugh Montgomery, one of the solicitors for the appellant, hereby certify that I have prepared a copy of the Assignment of Errors in the within case, certified to by me as such, and have placed the same in a sealed envelope, addressed to A. A. Fraser, solicitor for the defendants and appellees, at his place of business in Boise, Idaho, with postage thereon prepaid, and deposited the same in the United States mail.

HUGH MONTGOMERY,  
*Solicitor for Appellant.*

July 15, 1921.

Endorsed: Filed July 18, 1921.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

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BOND ON APPEAL.

Of Cross-Appellant.

KNOW ALL MEN BY THESE PRESENTS:  
 That we, Julia Green Graef, as principal, and American Surety Company of New York, as surety, are held and firmly bound unto J. L. Niday and Mollie Green Niday, his wife, and George A. Buell and Effie Ada Buell, his wife, and A. L. Green in the full and just sum of One Thousand (\$1000.00)



Dollars, to be paid to the said J. L. Niday and Mollie Green Niday, his wife, and George A. Buell and Effie Ada Buell, his wife, and A. L. Green or their executors, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators and assigns jointly and severally by these presents.

Sealed with our seals this 18th day of July, A. D. 1921.

Whereas, lately, at the District Court of the United States for the District of Idaho, Southern Division, in a suit pending in said Court between Julia Green Graef, plaintiff, and J. L. Niday and Mollie Green Niday, his wife, George A. Buell and Effie A. Buell, his wife, and A. L. Green, defendants, a decree of final accounting was rendered awarding to said defendants certain rights, and said Julia Green Graef having petitioned an appeal and filed a copy thereof in the Clerk's office in said Court to reverse and modify the same in the aforesaid suit, and a citation directed to the said J. L. Niday and Mollie Green Niday, his wife, and George A. Buell and Effie Ada Buell, his wife, and A. L. Green, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Judicial Circuit to be holden in the City of San Francisco on the..... day of August, 1921, having been served on said defendant;

Now the condition of this obligation is such, that if the said Julia Green Graef will prosecute her appeal to effect any answer all damages and costs if she shall fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

JULIA GREEN GRAEF,  
PLATT & PLATT,  
MONTGOMERY & FALES,  
By HUGH MONTGOMERY,  
*Her Solicitors of Record.*  
AMERICAN SURETY COM-...  
PANY OF NEW YORK,  
By BRADLEY SHEPPARD,  
*Resident Vice President.*

Attest: O. O. HAGA,  
Resident Asst. Secretary.

(SEAL)

Examined and approved this 19th day of July,  
1921.

FRANK S. DIETRICH,  
*Judge.*

UNITED STATES OF AMERICA, )  
 ) ss.  
 District of Oregon, )

Due service of the within Bond on Appeal, by certified copy thereof, as required by law, is hereby

acknowledged at Boise, Idaho, this..... day of  
July, 1921.

.....  
*Of Solicitors for Appellees.*

Endorsed: Filed July 19, 1921.

W.D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

\_\_\_\_\_  
(Title of Court and Cause.)  
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CROSS APPELLANT'S PRAECIPE  
FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above Court:

Please prepare and certify for the appeal of the  
plaintiff herein to the Circuit Court of Appeals of  
the United States for the Ninth Circuit, copies of  
the following:

I.

Original decision of the Court, filed October 25th,  
1920.

II.

Interlocutory decree of the Court, filed Decem-  
ber 23rd, 1920.

III.

Final decree of the Court, filed February 25th,  
1921.

IV.

Transcript of the record, which has been lodged  
in the Clerk's office by the appellant.

V.

Petition for appeal and citation on appeal.

VI.

Order allowing appeal.

VII.

Assignment of Errors.

VIII.

Appeal bond.

IX.

This praecipe.

X.

Citations showing service and return.

XI.

Certificate of the Clerk.

XII.

The decree prepared and presented by the plaintiff, which decree was denied by the Court; also the written authorization to the Clerk for the payment of Four Thousand, Three Hundred Thirteen Dollars and Forty-seven Cents (\$4,313.47).

PLATT & PLATT,

MONTGOMERY & FALES,

*Solicitors for Plaintiff and Appellant.*

HUGH MONTGOMERY,

*Of Counsel.*

UNITED STATES OF AMERICA, )

) ss.

District of Oregon, )

I, Hugh Montgomery, one of the solicitors for the

appellant, hereby certify that I have prepared a copy of the *Praeceptum for Transcript of Record*, in the within case,, certified to by me as such, and have placed the same in a sealed envelope, addressed to A. A. Fraser, solicitor for the dependants and appellees, at his place of business in Boise, Idaho, with postage thereupon prepaid, and deposited the same in the United States mail.

HUGH MONTGOMERY,  
*Solicitor for Appellant.*

July 15, 1921.

Endorsed: Filed July 18, 1921.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

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### CITATION.

United States of America to Julia Green Graef and Hugh Montgomery, her Solicitor, Greetings:—

You are hereby notified that in a certain case in equity in the United States District Court, in and for the District of Idaho, Southern Division, wherein Julia Green Graef is complainant and J. L. Niday, and Mollie Green Niday, his wife, George A. Buell and Effie Ada Buell, his wife, and A. L. Green, defendants, an appeal has been allowed the defendants therein to the United States Circuit Court of Appeals for the Ninth Judicial Circuit. You are hereby cited and admonished to be and



appear in said Court at San Francisco, California, thirty (30) days after the date of this citation to show cause if any there be, and why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Dated Boise, Idaho, this 22nd day of July, 1921.

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Witness the Honorable Frank S. Dietrich, Judge of the United States District Court for the District of Idaho, this 22nd day of July, 1921.

FRANK S. DIETRICH,  
*United States District Judge.*

Service of the within and foregoing citation on appeal herewith accepted.

HUGH MONTGOMERY,  
*Solicitor for Complainant.*

Endorsed: Filed Aug. 10, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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### STIPULATION.

It is hereby stipulated and agreed by and between counsel that the record filed in this Court upon the appeal of said J. L. Niday et al., as appellants, and upon the cross appeal of Julia Green Graef, as appellant, may be consolidated, and that the whole record or such parts thereof as counsel desire shall be considered by the Court on each of said appeals, and each party to pay the original

cost of the preparation of their respective records.

ALFRED A. FRASER,

*Solicitor for Appellant.*

PLATT & PLATT,

MONTGOMERY & FALES,

*Solicitor for Appellee.*

Endorsed: Filed Aug. 11, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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STIPULATION.

It is hereby stipulated and agreed by and between counsel for the respective parties that if the cross appellant, Julia Green Graef succeeds upon her cross appeal in the Circuit Court of Appeals for the Ninth Circuit of the above entitled action and costs shall be awarded her against the defendants, that the defendants be only required to pay one-third of the cost of printing and certifying the record on cross appeal.

PLATT & PLATT,

MONTGOMERY & FALES,

*Solicitor for Plaintiff.*

ALFRED A. FRASER,

*Solicitor for Defendants.*

Endorsed: Filed Aug. 11, 1921.

W. D. McREYNOLDS, Clerk.

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RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things

thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

(Seal)

W. D. McREYNOLDS,  
*Clerk.*

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(Title of Court and Cause.)

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CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 275, inclusive, to be full true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein, upon Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipis filed herein by the Appellant and Cross Appellants.

I further certify that Appellant's cost of the record herein amounts to the sum of \$222.35, and the Cross Appellant's cost of the record amounts to the sum of \$125.75 and that the same has been paid by the respective parties.

Witness my hand and the seal of said Court this 31st day of August, 1921.

W. D. McREYNOLDS,  
*Clerk.*













